PRE-TRIAL PLANNING CHECKLIST

BY KAREN BURGESS & ERICA HARRIS

TRIAL PLANNING DOESN'T HAVE TO BE overwhelming. As in construction, if you start with the right design, secure the right tools and team and regularly reassess, not only will you have more success for your clients, but you'll also have more time to enjoy your life outside the practice.

What this is not: This is not meant to be a lockstep guide to your trial procedure. It is not meant to be preachy. This is a checklist of actions to consider. We'd love to hear your additions and the war stories that caused you to make them.

A. Getting Started

1. Have you drafted a charge or proof chart?

2. Have you set up your task list?

a. Tasks are set forth in great detail

b. Tasks should be assigned to one, and no more than one, team member—assigning a task to more than one person decreases the chance of the task getting done in a timely manner

c. Each task should have a deadline

d. All deadlines are included from

i. court's scheduling order

ii. applicable rules of civil procedure

iii. all internal deadlines necessary to meet external deadlines and move the case forward

e. The task list should be circulated to all trial team members

i. consider including the client representative on the circulation of the task list—the task list reflects all the work you are doing, gives the client an appreciation of how much work there is, and keeps the client apprised at all times of the status of the case and work being done

ii. an example task list is included at Tab 1

3. Have you set up your regular (weekly, biweekly or monthly) trial team call?

a. Have a standing time for the trial team to talk

b. Preset 30-minute calls to avoid phone and calendar tag

c. Avoids many of the multiple calls among various team members each day

d. Review status of tasks on task list and decide what else needs to be done

e. If task isn't completed by internal deadline, resolve the delay problem and fix going forward

f. Keep the calls short—30 minutes or less—and invite the client representative to all or part

g. Save strategy discussions for the end of the call, but if those discussions would push the call beyond 30 minutes, set a separate strategy call

4. Have you set up an ongoing plan for discussions of budgeting, the timeline and expectations with the client?

5. Have you started preparing for the discovery process?

a. Litigation hold to your client

b. Image relevant devices

c. Load up documents online in a searchable database to share searches and avoid duplicating work

d. It's never too early to start marking hot documents -- challenging documents and privileged items, and Federal Rule 26 disclosures come quickly

6. Have you proposed trial agreements to opposing counsel?

a. List of pretrial and trial agreements to increase efficiency and decrease costs from wwwtrialbyagreement.com is attached at Tabs 2 and 3

b. Opposing counsel may be wary of agreeing to all, but most lawyers will agree to some of the proposed agreements—any agreement is an improvement over none

c. Consider agreements on length of trial, number of depositions, sequential exhibit numbering, real-time court reporting, sharing trial technology, etc.

d. Only realistic hope for pretrial agreements is to propose them at the very outset of each case; otherwise opposition will think the proposal must favor your client

e. Put the pretrial agreement in the scheduling order signed by the court or a protective order if one will be signed so that parties added subsequently will be bound by the agreement

f. Regardless, don't get trapped by Level II discovery deadlines under TEX. R. CIV. P. 190.3

7. If you represent a plaintiff, have you leveraged the first-mover advantage?

a. Absent limitations pressure, or the need for immediate injunctive relief, plaintiffs should use the time advantage inherent in choosing when to file

b. Use pre-suit preparation window to review your client's documents, interview witnesses and identify and hire experts before filing

c. Consider engaging an expert but telling him or her not to start work other than answering your specific questions

d. Pre-suit work will decrease total litigation costs; among other things, discovery requests will be better tailored and can be propounded right away

8. Have you demanded your jury and paid the jury fee?

a. Texas State Court—TEX. R. CIV. P. 216: demand must be made and fee paid at least 30 days before date set for trial

b. Federal Court—FED. R. CIV. P. 38: demand any time after commencement of action but not later than 10 days after service of last pleading directed to the triable issue; for removed actions *see* FED. R. CIV. P. 81(c)

B. Strategy

1. Have you identified and researched key legal issues?

a. Consider starting with blogs or CLE articles available online before traditional research

b. For internal purposes, often a formal, formatted memorandum is unnecessary—try an email with quotes pasted in from case law (both pro and con) and a brief analysis

2. Have you prepared the Hardest Questions & Answers memo?

a. This is a living document that is continually edited and revised through the life of the case, as new evidence comes to light and new challenges arise

b. Every trial team member should review the memo regularly and provide input to create the best answers

c. Forcing yourself to sit down, identify the hardest questions and organize your evidence into the best answers to each of those hardest questions helps avoid overlooking a weak spot

3. Have you prepared a list of your themes and the opposing party's themes?

C. Discovery

1. Is your protective order in place?

2. Have you reviewed the opposing party's privilege log?

a. Key documents are often hidden on the log

b. Pressing for *in camera* review may be better use of your time and the court's patience than a motion to compel an entirely new category of documents

3. Have you designated your expert witnesses?

a. Run their names through Westlaw, LEXIS and Google to know any adverse information before you designate

b. Have them commit in writing (email or otherwise) to availability for trial date

c. Have them execute agreements to abide by any protective order

d. Texas State Court—TEX. R. CIV. P.166(6)(b): At least 30 days before trial, unless docket control order provides otherwise

e. Federal Court—Usually, docket control order will establish timetable; otherwise, *see* FED. R. CIV. P 26(e)(1)—"seasonable supplementation"

f. Strategize about whether to depose opposing experts

4. Have you re-reviewed the documents since they were first reviewed for production?

a. Document review is not a one-time or associate-only task

b. We miss much of what is important when we look at the documents the first time—as our understanding of the case evolves, the importance of particular documents changes

5. Have you supplemented your interrogatory responses?

a. Texas State Court—TEX. R. CIV. P.166b(6)(a): At least 30 days before trial, unless docket control order otherwise provides

b. Federal Court—FED. R. CIV. P.26(e)

6. Have you supplemented your request for disclosure responses if in state court?

7. Have you filed any motions to compel, if necessary?

a. Make sure to confer

b. Use chart or other organizational display for the court

c. Carefully draft proposed order in advance

8. Have you amended your pleadings to comport with discovery and your theories?

a. Texas State Court—TEX. R. CIV. P. 63: At least 7 days before trial unless docket control order provides otherwise

b. Federal Court—FED. R. CIV. P. 15: Only by leave of court, unless a responsive pleading has not been served

D. Trial Preparation

1. Have you focus-grouped your case?

a. Focus groups can be formal or informal, but they are never a waste of time, unless you tilt the case to your side

b. Make sure the client knows you are testing themes, not outcomes

c. Avoid letting lawyer personalities/differences in advocacy skill levels override the facts and themes

2. Have you written or updated your status report to the client?
- a. Make sure to notify the client of the trial date in writing
- b. Explain which client representatives will need to participate and a rough estimate of when
- c. Include a written statement of courtroom decorum requirements
  - i. No talking to jurors
  - ii. Pay attention and be respectful

3. Have you notified witnesses, including expert witnesses, of the trial setting in writing?
- a. Issue subpoenas
- b. Consider whether an interpreter will be necessary

4. Have you updated your task list to be very specific?
- a. Start with outline of trial itself, day-by-day or hour-by-hour
- b. Include motions in limine, deposition designations, charge conference, directed verdict and other briefing as well as voir dire, opening and closing
- c. Breakdown what each person needs to do each day between now and trial to be ready
- d. Include drafting outlines for and then conducting meetings with each witness
- e. Daily (or twice a day) update to shift any unfinished work to next open opportunity

5. Have you prepared the jury charge?
- a. Consider choice of law
- b. Take into account contribution, counterclaims and crossclaims
- c. Include affirmative defenses

6. Have you prepared your outline of proof?
- a. Create from your charge
- b. Include a plan for admission of key evidence

7. Have you given notice of your intent to use another state's law?
- a. Texas State Court—TEX. R. EVID. 202: At any stage of proceeding
- b. Federal Court—FED. R. CIV. P.44.1: Reasonable written notice

8. Have you filed your business records affidavits if in state court?
- a. Texas State Court—TEX. R. EVID. 902(10): At least 14 days prior to day upon which trial begins.
- b. Federal Court—no deadline, just have them ready to admit evidence

9. Have you considered requesting bifurcation?
- a. Not always good for defendants
- b. Plaintiff may want jury to answer money questions in 2 separate phases

10. Have you prepared your motions in limine?

11. Have you designated your deposition excerpts?
- a. Shorter is generally better
- b. Try to agree on time limits so opposition doesn't drown out your good soundbites

12. Have you prepared your exhibit list?

13. Have you made an outline of pretrial matters to share with Court and opposing counsel at pretrial?

14. Have you prepared your voir dire questions?
- a. Consider how to identify your worst jurors
- b. Practice out loud

15. Have you prepared your opening statement?
- a. Circulate written version or thorough outline for all trial team members to review and comment
- b. Either circulate to client or practice in front of the client; her input isn't any help once you have presented it in court
- c. Even if you are great on your feet, oral statements are better organized and tighter if they have gone through multiple rounds of editing from different team member perspectives

16. Have you prepared your witness outlines?
- a. Strategize on witness order
- b. Long directs mean key points are lost in the middle
- c. Make sure impeachment clips (video or on paper) are ready to go
- d. You are unlikely to win an argument with an adverse expert—it's more impactful to make 4 or 5 cross points and sit down

17. Have you prepared your demonstrative exhibits?
- a. Mix media—from graphics to handwritten charts
- b. Consider whether summaries will be helpful. TEX. R. EVID./FED. R. EVID. 1006.
- c. If you or a witness will be conducting a live demonstration, please practice

It is a privilege to address a Court and jury, particularly in this day of the vanishing jury trial. Methodically building the case with the right design, team and tools, and walking in prepared—yet prepared for things to change—serves our clients and allows us to enjoy that opportunity.

Karen Burgess, a founder of Richardson + Burgess in Austin, was recently elected treasurer of the National Board of ABOTA and also serves on the Board of The International Academy of Trial Lawyers.

Erica Harris, a partner at Susman Godfrey L.L.P., has been recognized as a "Texas Super Lawyer," in "The Top 100" for the Houston Region, and among the "Top 50" female lawyers in Texas. ★

APPENDIX – TAB 1
TASK LIST

No.	Task	Due Date	Assigned To	Status
1.	Monitor production of expenses on joint project.	4/11/14	J. Doe	
2.	Prepare mediation statement and circulate draft by 4/18/14.	4/11/14	S. Associate	
3.	Forward CD with aerial photos to B. Man at SG so that B. Man can	4/11/14	H. Help	
4.	Ensure that Harry Truman's documents are reviewed and produced.	4/18/14	B. Catskill	
5.	Ensure that co-plaintiff produces consultant files in response to 3/5/14 R. Rip letter claiming that Ps have failed to supplement production with documents regarding consultants' work since January 2014.	4/18/14	M. Marigold	

APPENDIX – TAB 2
TRIAL AGREEMENTS

1. Real live witness lists will be exchanged on _____. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial

2. The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___ to open and ___ to close.

3. Deposition designations will be deferred until 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.

4. Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.

5. An agreed Motion in Limine (see Exh. A) plus a briefing schedule for contested limine motions

6. We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on ___ that will be limited to exhibits we in good faith intend to show to the jury during trial. Deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them

7. All un-objected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial

8. All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic

9. The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference

10. An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents

11. The jurors can take notes, can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of loose-leaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.

12. Jurors can direct, through the judge, questions to each witness before he leaves the stand. Attached as Exhibit B is a protocol of doing this.

13. The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The parties shall further notify opposing parties 36 hours before any particular witness is called live

14. Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.

15. The parties will exchange proposed preliminary and final jury instructions on _____ and ____, respectively; will ask the Court to give preliminary instructions; and will try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.

16. The parties will ask the court to instruct the jury before final arguments

17. The parties will jointly request real-time reporting

18. The parties will share any courtroom audio-visual equipment and will provide each other electronic versions of whatever they display immediately after the display

19. Each side will be allowed ____ minutes of interim argument that can be used in increments no greater than ___ minutes when no witness is on the stand

EXHIBIT A
AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401403.

9. Pretrial motions or matters.

Any pretrial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401403.

13. References to any anyone sitting in the courtroom.
Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401403.

14. Reference to other suits.
Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.
Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.
Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.
Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party
Any reference to the wealth, religious or political beliefs or sexual preferences of any party.

EXHIBIT B
QUESTIONS BY THE JURORS DURING TRIAL

1. The court will read the attached instructions included to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions.

2. After the parties have asked their own questions of each witness who appears and testifies, jurors will be given the opportunity to write any questions they may have for the witness on the attached juror question form.

3. To the extent possible, the court will take steps to maintain the anonymity of any juror who asks a question. The court will instruct jurors not to put their names on juror question forms. The court will provide each juror a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. The court will have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.

4. Upon receipt of a written question from the jury, the court will allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party's request, the court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.

5. In its discretion, the court may reword the question or decide that the question should not be asked. If the court rewords the question, the court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury's hearing.

6. If the court allows a verbatim or reworded juror question, the court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.

7. The court will include any completed juror question form in the record.

Attachments: **1)** Instruction on Juror Questions
2) Juror Question Form

Attachment 1
INSTRUCTION ON JUROR QUESTIONS

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

Attachment 2
JUROR QUESTION FORM

You may submit one or more questions about the witness's testimony. Your questions should be short. You may not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. The judge will apply the same rules to your questions that the judge applies to the parties' questions. These rules are based on various rules of law and procedure. Some questions may be changed or rephrased, and others may not be asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

APPENDIX – TAB 3
(Style of Case)
PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
1.	As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. Each side will copy all of its emails to the email group distribution list provided by the other side		
2.	Before depositions begin, we will try to agree on how long the trial will last and ask the Court to give us a firm trial setting and to establish the length of the trial. Whatever time is allotted will be divided equally.		
3.	Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. Each side gets ___ hours to depose fact witnesses and only one of such depositions can last more than 3 hours. This does not include 30(b)6 depositions.		
4.	At depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation or to the form of the question will be reserved until trial, so there will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments/objections to the jury		
5.	The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions.		
6.	All papers will be served on the opposing party by e-mail. For purposes of calculating the deadline to respond, email service will be treated the same as hand –delivery		
7.	Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.		

Item No.	Description	Agreed	Source of Agreement
8.	If the case is in federal court, the parties will seek an order from the court, under FRE 502(d), providing: Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated. Whether in federal court or not, the parties will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. The parties will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire email (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.		
9.	If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.		
10.	All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.		
11.	The parties will share the expense of imaging all deposition exhibits.		

Item No.	Description	Agreed	Source of Agreement
12.	We will exchange expert witness reports that provide the disclosures required by the Federal Rules. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports. There will be no depositions of experts unless an expert's report is incomprehensible or incomplete, in which case the party seeking clarification is required to establish the same by motion filed with the Court		
13.	The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.		
14.	Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.		
15.	We will agree to a briefing schedule and page limitations for all pretrial motions.		
16.	We will agree upon jury questionnaire.		

EFFECTIVE COMMUNICATION AND PLANNING IN LITIGATING SERIOUS DISPUTES

BY JOHN K. BROUSSARD, JR. & GEOFFREY L. HARRISON

John K. Broussard, Jr., LyondellBasell's Associate General Counsel for Disputes, and Geoffrey L. Harrison, a partner at Susman Godfrey LLP, sat down to discuss the importance of communication between inside and outside litigation counsel from the beginning of a dispute through its conclusion to celebration. Joining them were two Susman Godfrey associates, Guillermo Alarcon and Alejandra Salinas.

How do companies select outside litigation counsel for a particular dispute?

Broussard: Inside counsel usually have wide discretion in deciding who to hire to handle a new lawsuit. Business people usually defer to inside counsel about whom to hire. Litigation is not science, and neither is the selection process at times. In companies with multi-lawyer legal departments, we'll often ask each other "Who do you think for this one?" That yields a short list of potential outside counsel, and then we decide who to contact first.

Harrison: Companies often hire lawyers with whom they have an existing relationship. Winning helps too. Inside counsel also may be persuaded to work with new outside counsel based on reputation, experience, success in similar litigation, exposure as co-counsel, exposure (and maybe a good thrashing) as opposing counsel, or word of mouth from friends and contacts at other companies. While inside counsel generally make the hiring decision, there also are times when business executives get involved based on an existing relationship of trust and confidence with outside counsel from prior litigation.

How does a lawyer or law firm get on a company's go-to list?

Broussard: It starts with a development of a relationship of trust, and that trust relationship is built on lawyers who deliver results. We look primarily at lawyers as opposed to law firms. I used to think it was important to hire a law firm with a deep enough bench to staff the case, and to some extent I still do. But I'm primarily focused on hiring the right people for the job and, in the unlikely event that lawyer's firm can't staff the case as required, I'm willing to hire lawyers from another firm to supplement the team if that would be best for the case.

It starts with a development of a relationship of trust, and that trust relationship is built on lawyers who deliver results.

Harrison: Do great work, communicate promptly and substantively, keep your clients informed and involved, invite them to watch you shine at depositions and in court, and earn their trust and confidence. Outside counsel are more likely to find success (and repeat business) by recognizing and integrating their inside counterparts as part of the team, not as functionaries assigned to handle certain niceties of internal document collection. Inside counsel are experienced lawyers who oversee and are involved in a broad range of corporate legal issues, know their company's business and industry, have institutional knowledge, know their company's goals, and can be just as creative and strategic as the outside lawyers they hire—many used to be outside counsel themselves.

Do you consider non-hourly alternative fee structures?

Broussard: Yes, on a case specific basis. Inside and outside counsel openly should discuss the risks and rewards associated with different fee structures, and the relevant business people may be involved too. Clients sometimes are willing to spend more (or less) on a case than what might seem to match up with the dollar amounts at issue in a particular dispute based on precedent, principle, sending a message to repeat-litigants and opposing lawyers, and other considerations such as predictability of costs. "Wins" also should be properly defined when considering the fee structure.

Harrison: The key, as Broussard says, is for outside counsel and the client to communicate clearly about litigation objectives and the potential risks and rewards. Alternative fee structures are a powerful tool to align outside counsel's financial incentives with the client's objectives. Alternative fees classically apply to plaintiff side disputes that are well suited to a percentage-of-recovery contingent fee, a flat

monthly fee that avoids any surprises about the amount of fees incurred in particularly active months, or a hybrid structure that, for example, combines flat fees or discounted hourly fees with contingent fees or bonuses for achieving certain defined results. Alternative fees also may be appropriate on the defense side where a hybrid fee structure may include bonuses for certain defined results or a contingent fee based on the amount of money saved—compared to damages sought, the company's reserve for the litigation, prior settlement offers, or some other benchmark. Even if you end up with a simple hourly arrangement, there is value in having explored the client's goals, discussed risks and rewards, and conveyed to your client that you're willing to bet on yourself and take financial risks aligned with the client's view of success.

How can outside counsel better align its deliverables and goals with what the business needs?

Broussard: The three pillars to a good counsel relationship are results, costs, and service. That's often how business units evaluate legal departments. So that's a large part of how inside counsel evaluate outside counsel. The lawyers, when thinking about goals, deliverables, or even specific tasks on a matter, should constantly ask themselves whether they are focused on the *client's* results, the *client's* costs, and the *client's* expected level of service. Regarding results, the "win" should be defined early and reviewed often. The level of service should be proactive and purposeful, with timely and honest communication. The cost consideration is not necessarily low cost, but more often being cost-appropriate: Does it make sense to fly out of country to take a deposition of a witness who will not be a factor at trial? Should we file a discovery motion now, or do we wait to see if we really need those documents? If you are having these kinds of discussions with your inside counsel, then you are likely getting to the heart of effective communication and case planning.

Harrison: Outside counsel's objectives should be to win, to make inside counsel look good in the process of winning, and to have some fun along the way. Communicate, coordinate, and celebrate. Communicate orally and in writing so your client/inside counsel knows the status of the litigation and impending deadlines, has time to review and comment on draft filings, and knows and has time to process developments in the case. Coordinate team meetings, strategy sessions, and updates with executives and business units as inside counsel deems appropriate. Celebrate when you win—eat, drink, be merry and, most definitely, rise and toast your clients and colleagues for their contributions to your shared success.

Outside counsel should do more than just spot issues. Own the situation, make legally and factually informed recommendations, and take responsibility for your recommendations. Get inside counsel involved of course, but don't just ask them what they think—inside counsel wants (and deserves) to know what their highly paid outside counsel recommends and why.

What causes budgeting issues and how does that relate to managing expectations?

Broussard: There sometimes is an issue about what is at issue. Some lawyers will wow you with detailed budgets, but that's not particularly useful when they don't execute according to the budget or when the budget reflects a misunderstanding about the nature of the dispute and what it will take to resolve it. Budgets are a tool for inhouse lawyers to know not only *how much* will be spent on a matter, but *when* it will be spent. Good lawyers will have budgets that address both factors. Budgeting concerns also go beyond dollars and extend to human resources—which business people at the client company are likely to have how much of their attention diverted from managing the business to playing a role (managerial, witness, or otherwise) in the litigation. Open discussions about budgets with your counsel at the outset will avoid surprises and manage expectations.

Harrison: Communication is a powerful device for managing budgets, managing expectations, and avoiding surprises. Outside counsel should have a robust discussion with inside counsel (and perhaps also with appropriate business executives) about the nature of the dispute, what's at issue, the risks, rewards, client objectives, and the range of potential outcomes from bad to good to great. This discussion should take place early and often, starting from the time when the client is contemplating bringing a lawsuit as plaintiff or when the client has just been sued or threatened with a lawsuit as defendant. This early discussion may help structure a fee agreement that appropriately aligns the client's and outside counsel's financial interests in a way that allows the client to budget for attorney's fees, as with fixed monthly fees along or as part of a hybrid arrangement. Outside counsel of course also promptly should inform the client of events during the life of the litigation that may influence the budget or expectations. Such events may include opposing counsel's scorched earth tactics, evidentiary developments, court orders, corporate transactions, and plenty of other externalities.

How involved should the client be in deciding which lawyer handles particular tasks?

Broussard: I might not care to make the ultimate decision about which lawyer handles a task (and I rarely have to), but I at least want to know who is doing what work. There are

multiple reasons for this, but most of all so that I can call the person most involved in handling a certain task. The law firms we use have lots of qualified young lawyers, and it is beneficial to know outside counsel's thinking about whether and why a senior partner is assigned to handle a certain deposition or hearing that could (and perhaps should) be he handled by a more junior lawyer.

Harrison: Outside counsel should keep clients fully informed about who is doing what on all tasks of substance such as reviewing documents, drafting discovery responses, drafting motions and other filings, meeting and conferring with opposing counsel, identifying and working with experts, handling depositions and hearings, role playing at mock trials, and handling openings, closings, and particular witnesses at trial. Clients should have the opportunity to ask questions and weigh in on all case assignments. Inside and outside counsel should consider each other with respect and as strategic partners.

How should inside and outside counsel manage disagreements?
Broussard: Face to face. Or at least on the phone. Not by email, unless they are minor.

Harrison: Promptly and in person. Keeping clients involved and well informed is a good way to avoid disagreements by avoiding surprises. It is good practice to provide the client with a frequently updated task list that identifies tasks and deadlines, the person handling each task, the due date, and the status. It also is good practice to have a weekly conference call of 10-30 minutes to review and discuss the task list, case status, strategy, invite suggestions, and discuss any issues or concerns that the client or anyone else may want to raise.

What happens when you're faced with litigation against an ongoing business counter-party?
Broussard: It's a consideration, and hopefully not one that outweighs the merits of a particular dispute. Sophisticated companies understand that litigation can be a part of corporate life, and companies understand that litigation over one project may not mean an end of business relations at other unrelated projects. Because outside counsel are an extension of the legal department and the client, outside counsel should be aware of these considerations and can play the role of good cop or bad cop, depending on the situation. Again, this should be part of the communication and planning at the outset—ask your clients whether they have ongoing business with the counter-party and where does the dispute fit in the context of that relationship.

Harrison: It is fairly common for business counter-parties simultaneously to confront litigation and an ongoing business relationship. This happens with some frequency in construction litigation where project owners pursue claims against contractors before project completion. This is an important feature of outside counsel's understanding the client's goals at the outset of the dispute, evaluating strategies and, together with the client, defining what constitutes success.

What is a less than positive experience you've had due to poor planning in a case?
Broussard: I remember a time when outside counsel failed to plead an affirmative defense that he was instructed to plead and, as it turned out, we needed that defense. I was not impressed. More generally, we have experienced—and hopefully learned from—a wide range of disappointments from a failure to properly plan or failure to properly staff, and that often leads to a failure to properly react to case developments. When this happens, at best, you end up with an inefficiency that can sour the relationship even when not affecting the merits of the case.

Harrison: I am actively involved in all aspects of my cases, from reviewing documents to holding weekly team meetings to drafting and revising filings to handling depositions to arguing at hearings to trial examinations and opening/closing arguments to planning celebration dinners.

How important is winning?

Broussard: We like to win and we're not afraid to say so. We're disappointed when we don't win, and we're happy when we do.

Harrison: Amen.

John K. Broussard, Jr., LyondellBasell, Associate General Counsel - Disputes

Geoffrey L. Harrison, Susman Godfrey LLP, Partner ★

EARLY DRAFTING AND STRATEGIC USE OF THE JURY CHARGE

BY BRANDY WINGATE VOSS

I **RECENTLY SERVED AS APPELLATE COUNSEL** in a lengthy criminal jury trial. I sat in the back of the courtroom, listening to the evidence and researching the jury charge. Appellate counsel for the State was noticeably absent.

Near the end of trial, the judge asked for the parties' proposed jury charges. The State let slip that it had not even started drafting a proposed charge.

When I finally received the State's charge a few days later, I was elated. The State used a form book generally applicable to the particular crime. The book suggested one definition in particular that was *not* in the Texas Penal Code and, in the factual context, would have gutted the State's case. The parties argued the charge for quite a while before the trial court (but not the State) caught the error. (And I had a Scooby-Doo moment—I would have gotten away with it if it weren't for that meddling trial judge.)

The jury charge should be one of the first documents you draft in your case, and should ideally be done with the help of appellate counsel.

The jury charge can make or break your case. In civil cases, the jury charge may be the most important document drafted. Even if it incorrectly recites the law, if no one objects the evidence will be judged by the law set forth in the charge. *Lozano v. Lozano*, 52 S.W.3d 141, 145 (Tex. 2001) (Phillips, J., concurring and dissenting); *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985). In criminal cases, your client's life or freedom may depend on the instructions received by the jury. Why would you wait until the end of trial to start working on this critical document?

The answer is clear: You shouldn't wait. The jury charge should be one of the first documents you draft in your case, and should ideally be done with the help of appellate counsel. If you are contemplating hiring appellate counsel, do it early, particularly in complex cases. I have turned down cases because I felt that trial counsel waited too late to get me involved, and I was not willing to risk malpractice by jumping in at the last minute. You do not want to risk a similar predicament by waiting.

Here are a few of the benefits of drafting the jury charge early, with the help of appellate counsel:

Understanding the case's strengths and weaknesses at the outset helps manage client expectations: Drafting the jury charge is one of the very best ways to evaluate a case. If you have already done the research and know what will likely be in the jury charge, you can ask better questions of your client. You will know where the legal pitfalls are, as well as how and whether you can avoid them, allowing you to counsel your client accordingly.

For example, if you recognize early on that a legal issue applicable to your case is percolating through the court system, you can more effectively explain to your client how it will affect the issues the jury will consider. Managing client expectations can also lead to earlier resolution of the claims. For example, I have often used proposed a jury charge at mediation to help explain to the opposing party the weaknesses in their claim. And let's not forget, managing client expectations early on reduces the chances of a grievance!

Drafting pleadings: If you have researched and drafted the charge, drafting pleadings will be much easier. Many form books are generic and do not expound on the elements of the claims or the proof required for each element. Researching and drafting the jury charge will give you a much better understanding of the elements of the claims and defenses, and you can then craft your pleadings to cover them all. This will save your client the headache of dealing with special exceptions or other dispositive motions based on missing elements in the pleadings.

Drafting discovery: Perhaps the greatest benefit from early drafting of the charge comes during discovery. Trial lawyers often forget to conduct discovery on elements of their claims

or defenses and get ambushed at trial. Don't be that lawyer! Draft your jury charge, then craft your discovery requests to cover every part of the charge. That way you will be certain to have the proof you need on all elements.

Dispositive motions: Moreover, if you have your draft jury charge handy, you will be able to tell how prepared your opponent is or is not. You can use your jury charge as a checklist to compare against your opponent's discovery requests to determine if he or she has overlooked an important element. This will allow you to quickly and easily draft dispositive motions challenging your opponent's claims, such as no-evidence motions for summary judgment. Conversely, if you have drafted the jury charge and used it to prepare your discovery, you will more clearly see the strengths and weaknesses in your own case and will not be caught off guard by your opponent's dispositive motions.

Preparing your case for trial: If I am serving as appellate counsel in a case, I always use my jury charge to prepare a trial outline for the trial lawyers. I break the charge down into the smallest elements in an outline form. The trial lawyers and I then talk through and fill in the outline with all the evidence relevant to each element of the charge. This helps the lawyers prepare their case and ensure they have evidence on each element of the case. Then, at trial, we use the outline as a checklist to make sure that evidence of each element has been admitted.

Don't wait until the eve of trial to hire appellate counsel: I cannot stress this enough. Think about my example above. Don't bank on a Scooby-Doo moment to save your bacon. Hire your appellate counsel early, bring them to trial with you, and let them handle the charge for you. Doing this ensures that the appellate lawyer is prepared for the charge conference and aware of the evidence that has been admitted or excluded from trial, allowing you to focus on closing arguments instead of hammering out the jury charge at the last minute.

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HARNESSING TECHNOLOGY DURING DISCOVERY

BY PAMELA RADFORD

"Our jury came back the next day and gave us $90 million." "Our jury deliberated for an hour and a half and came back with a Not-Guilty verdict for our client." "It only took the jury 2 hours to pour out the plaintiff and give us a complete defense win!" These are true verdicts - a litigator's dream.

IT'S THE PIPEDREAM THAT DISTRACTS every young law student during ConLaw class. After working for years on a case putting in thousands of hours, finally taking your case to trial and coming back with a win; yet cases filed today only have a one in ten chance of seeing the inside of a courtroom with a jury sitting in the box. Approximately 90% of all cases settle or are disposed of via rulings from the Court. Lawsuits are expensive. They are time-consuming and costly not only monetarily, but with resources and in the case of parties who don't sue or get sued all the time, it is a personal nightmare.

GOING TO TRIAL:

The process by which we file a case, take discovery and prepare for trial often takes years and a great deal of money. Most cases settle shortly before trial partially because clients and firms reach maximum capacity for investment. It is the rare case that goes all the way into the courtroom for trial and even fewer make it to a verdict. All of that hard work reviewing documents and taking depositions never gets to see its day in court. But that is changing.

Most cases settle shortly before trial partially because clients and firms reach maximum capacity for investment.

The advancement of machine learning decreases the time lawyers spend reviewing documents, and is lowering the cost of document review. New options for taking depositions are decreasing deposition costs. Both of these technologies are bringing down the cost of discovery and making the process much more efficient. New products in development are also merging the discovery and trial presentation technologies, which will be a great improvement on prior attempts to bridge the gap between discovery and trial.

DOCUMENT REVIEW:

Litigation expenses are frontloaded. Discovery consumes the majority of time and resources in a case, even when it goes to trial and you get a verdict. The RAND Institute for Civil Justice published a study called *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*[1] and found that 70% of discovery costs come from document review during discovery.

So how do you streamline the process, reduce costs and get your case to trial faster? It takes time to review a document, analyze for relevance and make a decision. This is usually done by an attorney, or more often a team of them. You can't speed up the physical process. You can't make your eyes see a document any faster and you can't make your brain process and form a judgment on that document any faster. Or can you?

Enter Predictive Coding and Machine Learning. It's the new iPhone X of litigation and it is hot. Not because the technology is new, it's actually been around since the 1960's, but because it has developed into an accurate, trustable, user friendly technology. And you can afford it. In fact, pretty soon, you can't afford not to have it on every machine in your firm. Just like your email, it will soon be one of the first icons you double click on as you set down your cup of coffee to dive into your case.

What is Predictive Coding and Machine Learning? It's a sub-science of Artificial Intelligence, and I don't mean the type that comes down to Earth in a space ship and lands in an Iowa cornfield. (Here is where you say, "That's not funny and doesn't help me understand it at all.")

Let's start with Electronically Stored Information (ESI). These are all the files collected and preserved in a case. It's everything from paper documents found in client files, to emails written by key witnesses, to files created on company computers and deemed to be potentially important during the review of the case. All of these items are collected through the Request For Production process and stored electronically in

preparation for review and relevance determination.

During the discovery process, typically ESI is collected and reviewed by humans for relevance. What happens in Machine Learning is that the human actually teaches the machine what it is looking for by way of interaction. The technology simply reads words and phrases and classifies the documents into different conceptual buckets according to what the human tells it are relevant. Those buckets are: "Relevant", "Irrelevant", and "Uncertain".

MACHINE LEARNING REVIEW STEPS[2]

Step 1 – Seeding: Consists of defining the key search terms called "Seeds" which is done by humans. Seeds can be examples of known relevant or irrelevant documents or more often they are a first-round list of search terms. This step tells the machine where to start.

Step 2 – Training: The seed documents are tagged as "Relevant" or "Irrelevant". Then the lawyers will review the seeds in the traditional way telling the machine which bucket to place them in – Relevant or Irrelevant.

Step 3 – Predictive Analysis: The software takes the human decisions during training and makes predictions as to what buckets the documents should be dropped into. They go into one of three "Relevant", "Irrelevant" or "Uncertain".

Step 4 – Train & Stabilize: The training process continues as the machine churns out documents into the three buckets and the human reviews them, the most critical of them being "Uncertain" as that is how the machine learns and continues to change and update the universe of ESI in your production. The human can update terms or relevancy and the machine continues to update the buckets until finally you hit "Stabilization". This is the point where the human and the machine agree on what is relevant or irrelevant and the machine stops learning.

Step 5 – Complete Review: Once Stabilization occurs and the software has a good idea of Relevant or Irrelevant documents then the lawyers generally review the relevant documents.

But what happens when issues change during the case or a lawyer changes his mind on what's important (What, a lawyer changing their mind? Never!). What happens to those documents that were originally marked as "Irrelevant" but now just might be that smoking gun you needed? The software creates a unique fingerprint for each document based on its contents which, like human a fingerprint, never changes. As the human changes his mind about what is relevant, the technology learns from that and places the document into the different relevancy bucket. In other words, the document's importance can change over the course of the document review.

When you decide to jump onto the machine learning bandwagon, it is not a far leap. In fact, you likely already have the first piece which is the "Review Software". iPro's Eclipse and Relativity are two of the most popular of these products in a field of many. These programs host the documents for review, tagging and case management and incorporate "passive" machine learning technology. A second product like iControl's Envise or BrainSpace 6 is the leap or "predictive coding" piece. Those tools use "active" machine learning technology, sometimes referred to as "Continuous Active Learning" (CAL) which feeds the "review" software what it learns. Using only the passive learning technology will get you to the same result in document review, but adding true "active learning" gets you to the finish line faster and using less resources.

The other beauty is that these big players in the market are now starting to play in the sandbox together, recognizing that the discovery process is flattening out and that technologies need to talk to each other. So, if you have some staff who like Relativity but others who want to use the CAL capabilities of EnVise, they will integrate. It is a worth a mention here that the recent merger of iPro and InData are leading the charge to take this one step further by connecting trial presentation and discovery technologies.

Let me be clear and upfront this technology is not going to replace lawyers or your staff unless you let it. What it is doing is making you more efficient, in a way that is just as accurate (if not more) as the traditional process and therefore more cost effective, both to your clients and your bottom line. The RAND study predicts that you can save as much as 75% of cost by implementing advanced analytics like machine learning.[3] In the end, it allows you to decrease discovery costs, take on more cases and get them to trial faster, which is what you as a litigator are trained to do.

DEPOSITIONS:

A discussion on using technology during discovery must include depositions for that is the shovel we use to dig up the ground to find the golden nuggets for trial. Depositions are also an area where valuable time is often consumed by invaluable transit. A lot of time is spent traveling to and from

the deposition location. It's either the counsel who has to fly from Dallas to Chicago to defend a client or the witness who's rearranging his schedule to get to the attorney's office to give his testimony. It will always be important for lawyers and witnesses to be in the same room together, but new technology is available for situations where it is not imperative for a lawyer to be in the same physical space as the witness. He or she can log into a conference room on-line and actively participate in the deposition in real time.

Some court reporters and videographers now offer the capability to attend a deposition on-line. Simply put its like video conferencing on steroids. A conference "room" is opened up on-line and anyone with permission can log in, including the witness. Typically you still have the normal deposition set up with a witness, court reporter, videographer and the main attorneys for the case in an actual room. The only difference is an additional screen showing who is logged in. Those who are in the on-line room will see only the witness but they will hear everyone in the room. The on-line attorney can object in real time, comment on the record and ask questions when it's her turn. She can also show and annotate documents on the screen and the witness can too!

Legal Media, Inc. offers a service called "On-Line Depo Room" which uses technology created by Remote Counsel that serves as the room connection. While video conferencing technology is not new, the interactive use during depositions is catching a wave in the discovery process. *"It's valuable to many lawyers who don't have the time or resources to travel long distances but still need to be present in the deposition. It gives them much more flexibility than just attending a deposition telephonically."* said Matt Boles, Legal Media's Vice President. In some cases it is even being used by an attorney who may need to attend the deposition as a minor player but doesn't want to drive across town. It can be also used with an expert or the client who needs to attend the deposition as a passive observer. In any case, it frees up valuable time that can be used doing other more case specific tasks, and the beauty of it is that you can log in from any device with a camera, such as a laptop, iPad or even a smartphone. The important thing to remember with on-line depositions is to find a qualified court reporter and videographer who have invested the time and training into their own staff and technology.

CONCLUSION:

Technology can help lawyers become more efficient and make more time available to spend on the most important aspects of the case. Cases will be ready to go to trial much faster, parties will spend less money getting ready for trial and there will be more bandwidth to actually get your case in front of a jury. Litigators will get to do more of what they are trained to do, which is to go to trial.

Pamela Radford is President of Legal Media, Inc., she specializes in trial presentation, consultation and design in complex, large-scale litigation all over the United States. She has worked on numerous high-stakes and landmark cases in civil and criminal courts, including US v Jeff Skilling and Ken Lay*,* Jackson v AEG*, and* Deepwater Horizon litigation. ✭

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[1] N.M. Pace & L. Zakaras, *"Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery,"* 2012 found at http://www.rand.org/pubs/monographs/MG1208.html. Synopsis of the report can be found online at http://www.redgravellp.com/sites/default/files/RandReport_TamaraKarel%281%29.pdf.

[2] M. Walker, *"Is AI Replacing Lawyers and their Staff?"* 2017 available online at http://www.esigladiator.com/.

[3] N.M. Pace & L. Zakaras, *"Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery,"* 2012 found at http://www.rand.org/pubs/monographs/MG1208.html. Synopsis of the report can be found online at http://www.redgravellp.com/sites/default/files/RandReport_TamaraKarel%281%29.pdf.

COURTROOM STRATEGY IN THE TECHNOLOGY AGE

BY MARTIN E. ROSE

THERE IS A BIT OF IRONY THAT I PENNED this article at the request of the editor, Tom Kurth. Tom is one of two lawyers I credit with convincing me—in the dawn of this technology age—to embrace technology in trial practice and use it to better manage and present your case, thereby improving its persuasiveness. The other trial lawyer? Wendell Turley. Those introductions bookend both the focus of trial work today and this article: that is, using technology to prepare your case and then using it to present and persuade in your case. In my experience, "technology" is an all-encompassing concept that presents itself in many different iterations. Here are a few that are beneficial to trial lawyers:

Display Devices

I tried a wrongful-death case against Wendell in 1992, and he was already using a brand-new machine—the video presenter (or ELMO) that is now a standard piece of equipment in most courtrooms in Texas. I had never seen one and was still using foam boards to convey key evidence. I watched with fascination—and a bit of jealousy—as Wendell used the device to seamlessly present evidence in a way the jury could easily see and understand. When I asked if I could use it during trial, Wendell, being the gentlemen that he is, readily agreed and even showed me how to use it. I was hooked. We acquired one immediately and used it extensively. At the time, these machines were huge, heavy, and cantankerous. Since my firm traveled around the country trying cases, we purchased an expensive, custom-made carrying case to house and safely ship it from courtroom to courtroom. Now, not only do most courtrooms already have them installed, but they are small, easy to carry, and even easier to use. Indeed, we have even moved into the era of high-definition video, with most courtrooms having the capability of projecting video in addition to still images. As noted below, video can be an effective tool when used properly, so don't neglect those display devices, either.

As a lawyer who has embraced each new software and hardware offering, I have found that one thing is certain: technology is like riding a new horse – one of you is going to be the "alpha."

Outlining, Case-Management, and Document-Management Software

Tom Kurth and I also had a case together in the early '90s. It was a huge, document-intensive commercial dispute, and while we represented different parties, our interests were closely aligned. I have always used outlines, and I quickly noticed that Tom had a program that automatically created outlines. I asked about it, and he introduced me to the first outlining software program—on a floppy disk, of course. Once again, I was hooked. Since then, outlining and case-management programs have proliferated. Though some are fundamentally no different than their early predecessors, others have become quite complex and innovative. While an analysis of these programs is beyond the scope of this article, they continue to be a wise investment.

But the question that those early technology pioneers sought to answer is the same question we are all trying to answer today. Namely, can we use technology to develop and present our client's case more accurately, cheaply, effectively, and persuasively than previous generations of trial lawyers?

Technology is everywhere, and the temptation to use it is strong. As a lawyer who has embraced each new software and hardware offering, I have found that one thing is certain: technology is like riding a new horse – one of you is going to be the "alpha." If you don't take firm control in each step of adopting technology to your trial practice, that technology will eat you alive. And there is a second truth in this technology era that is equally important to grasp: both sellers of software and hardware consistently over-promise and under-deliver.

And in keeping with the equine theme, let me add that you can't begin to harness technology to manage, parse, discover, and present your case to the court and trier of fact, unless you have first carefully analyzed your case.

The concept of thinking first and acting second—making

analysis your first task—is easier to understand and adopt if you think of it this way: in a case of any complexity, there will be thousands, if not millions, of documents, images, e-mails, texts, tweets, etc. But you can't just review all of that information hoping to find a theory for your case. You must first figure out your theory, and then go find the documents—in a laser-focused search—to prove it.

The real challenge in today's world of endless, open discovery is narrowing down 2 terabytes of data to 100 or fewer exhibits. The more data that is available, the greater the temptation to use everything you find. But trials are expensive, and judges are increasingly putting lawyers "on the clock." So, whittling down that treasure trove of e-mails, memos, texts, and other documents can be a monstrous task. Besides, if your case hasn't been narrowed down to as few exhibits as possible, your preparation is incomplete. Document-management and search-engine software titles abound in the legal marketplace. But I'll caution once more: software sellers over-promise and under-deliver. So, if you find a workable provider or program, it is prudent to stick with it until something clearly better comes along.

PowerPoint Presentation Software

As anyone who has recently spent time in a courtroom knows, the presence of presentation software is nearly ubiquitous. Since Microsoft's PowerPoint software program has essentially become the generic name for presentation software (as Kleenex is to tissue) I will use the phrase "PowerPoint" generically in this article. It is worth noting, however, that there is bountiful competition today in the presentation-software space. Programs such as KeyNote, Slides, Prezi, and others—both free and for a price—are worth consideration, depending upon your individual needs.

Eons ago, in legal Neolithic times, the emergence of presentation software as a solution to courtroom communication was brilliant, paradigm-shifting, and a boon to trial lawyers. Lawyers bent on finding a way to keep their audience focused and entertained (yes, entertained) while communicating complex legal issues and fact patterns in a simple, organized, visual format found an answer in PowerPoint. As so often happens with technology as it gains acceptance, PowerPoint today is often overused, misused, or relied upon as either a gimmick or a shortcut for good preparation. In the hopes of helping others avoid these pitfalls, here is a quick discussion of the "Dos and Don'ts" for using PowerPoint:

DO use PowerPoint for:

- Oral argument of complex motions or hearings before the court. PowerPoint can be a powerful tool to inform and persuade a busy judge of the merits of your case. It can also be a powerful way to imprint your key points. An ideal approach is to visually display your presentation while providing the court with a hard copy with which she can make her own notes for later reference. I learned the value of this approach from the boardroom, not the courtroom. Corporate America conducts business on PowerPoint, and has for years. Significant meetings are presented through PowerPoint slides. When I meet with a client's management team, they invariably expect to see a PowerPoint presentation and receive a hard copy—in advance. The hard copy becomes their note pad and easy reference tool for further decision making or action. Carrying this management style into the courtroom is an obvious plus. Judges work hard and manage huge caseloads. They are continually bombarded by lengthy, contentious, exhibit-laden motions and hearings that are often boring, usually too long, and almost always repetitive. If you can hand a judge your case, boiled down to a few key points and illustrated on clear color slides, you hand the judge a powerful advantage for your client.

  That value greatly increases when the court takes the motion under advisement following oral argument—a now-frequent occurrence in summary judgment hearings, for example. If we followed our judge into her chambers, we would often find that she has heard the argument, read through the large stack of briefing and evidence, and placed your case on her credenza, to return later today, tonight, or over the weekend for additional consideration. Invariably, on the top of the stack of documents, is that hard copy of the PowerPoint presentation with the notes she took during oral argument. When she finally has a chance to get back to your case—an hour, day, or week(s) later—which documents will she likely turn to first? Opposing counsel's 25-page brief with 75 pages of exhibits, or that clear, concise PowerPoint?

- Highlighting and emphasizing key phrases or information in exhibits.

- Summarizing complex evidence simply and clearly.

- Making a point in a concise manner. Remember that less is more—and while editing for brevity is a difficult task, it is well worth the time and effort.

- Leaving a lasting impression. As noted above, make sure you always provide the judge a hard copy.

DO NOT use PowerPoint for:

- Reading your argument outline to the jury. The number of times I have seen a lawyer stand up and read—word for word—his PowerPoint in front of the jury (or even the court) sickens and saddens me. The fastest way to bore and insult a jury is to read to them. More importantly, you are standing in front of them to make a human connection and persuade them. The jury needs to be engaged and constantly moving from you to the PowerPoint on the screen; back and forth, back and forth. Keep them awake. Keep them glued. Keep them focused on you.

- Providing overly lengthy quotations straight out of the text. Remember the old adage: a picture is worth a thousand words. Give the judge and jury the metaphoric picture, not the lengthy, verbose text. Remember, we have a President who communicates key policy issues to the public with less than 140 characters! Surely you can avoid PowerPoint slides that are covered in lengthy quotations that are guaranteed to lose your audience.

Video Depositions

I am still amazed at the number of lawyers who do not regularly videotape depositions. I don't address these comments for those instances where the case value or the client's budget doesn't warrant it, or where the witnesses are within the subpoena range of the tribunal. But a written deposition fails to convey the most powerful tool in the jury box: the power to judge credibility. There is enormous value in the jury seeing a witness squirm, hesitate for 20 seconds, look toward his lawyer, or lose his temper. These visual clues are often more persuasive then the written word; use them.

I am even more amazed when I see a lawyer take a video deposition and then ask meandering questions or fail to tie a witness's testimony up in a clear summary line of questions. When you plan to videotape a witness, it is presumably because that witness will likely be unavailable at trial and you are preserving his testimony to present to the jury. With this in mind, your goal is clear: try to get useable sound bites. Remember this rule of thumb: a video deposition that plays longer than 30-40 minutes is usually too long. Advance preparation and planning regarding your plan of attack will lead to brief, clear, and concise sound bites that bolster your case before the jury.

E-mail and Other Communication Methods

Finally, let's talk about the power of e-mails and their use (and misuse). And, while we are at it, let's discuss text messages, tweets, Facebook posts, and other casual social media channels. The rules of evidence evolved over centuries of dealing with documents that lawyers could touch with their hands, that involved fixed images created by ink on paper. But this is no longer true. Many attorneys continue to think of e-mails as informal, unimportant sound bites, since they are generally not carefully drafted and often sent in a moment of frustration or emotion. Yet they are frequently the source of dynamite material for the opposing lawyer. Of course, text messages are even worse, as are the memes, photographs, videos, and other assorted things people attach to them. These brief, seemingly inconsequential, communications have made many a case and ruined many careers. A smart trial lawyer looks for them and exploits them.

With the social media explosion comes a host of issues, problems, and limitations. John Browning, a trial lawyer and prolific writer, has focused on this area, to great effect. John has written extensively on the subject, and his book and articles are worthy of reading.[1]

Ultimately, though, today's technology age provides a multitude of implements that a wise trial lawyer will adopt and incorporate into his or her trial strategy—from the very first client meeting to the successful verdict. From efficient, effective use of software, hardware, devices, and even social-media platforms, the tech-savvy lawyer has a decided advantage over the Luddites who choose to shun these marvelous tools.

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[1] *See, e.g., The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law* (Thomson Reuters/West Publishing 2010); *Using Social Media Evidence in Family Law Proceedings,* UT-CLE Annual Family Law Seminar, June 2011; *Authenticating Tweets: Discovery & Use of Social Media Evidence*, Texas Advanced Evidence and Discovery course, May 2011. For further listings, please see http://www.passmanjones.com/Attorneys/John-G-Browning.aspx.

STRATEGIES FOR SUCCESS AT TRIAL: HOW TO CHANGE YOUR JURY SELECTION PREPARATION TIMELINE AND WHY IT MATTERS

BY TARA TRASK & HAILEY DRESCHER, PHD

IN OUR EXPERIENCE, TWO OF THE MOST OVERLOOKED and underprepared parts of any trial are voir dire and jury selection. The gravity of this reality is only eclipsed by the related truth that few parts of a trial have the same potential to make or break a case. So why is it that many litigators view jury selection and the preparation needed as an afterthought at best, or a "roll-of-the-dice" nuisance at worst? There are many reasons, but a perceived lack of control over the process and a deficit of relevant experience are the most significant and likely culprits. Overcoming these challenges and harnessing available tools and insight in your voir dire and jury selection preparation will undoubtedly make for a better trial strategy. Considering your jury early in the case can dramatically improve your odds for a positive result in the courtroom or the mediator's office.

Here is a suggested timeline for considering and selecting your potential ultimate fact finder:

The Trial Date is Set:
Call a trial consultant and retain them to help you. At the very least, you can use the help on the day of jury selection. This is also a good time to have a brief discussion about the issues in the case and to brainstorm about how "regular folks" might problem-solve your dispute. Obviously, each case is different, and the resources you can devote to outside assistance is a function of the potential damages or risk in the case. If the case doesn't warrant a consultant, find a high school freshman and explain the case to them. If you find that you can't, you might still consider an hour or two of a consultant's time. Our view is, if you can't explain what your case is about to a 9th grader, you don't actually know. Now is the time to start framing the narrative of your case—and thinking about who you are selling your case to (rather than the legal arguments and motion practice to the court).

Ninety Days Before Trial:
If your case is headed for trial and you are 90 days out, now is an opportune time to do some kind of testing. The form this takes will again be a function of the potential damages or risk in the case. If the case warrants the outlay of resources, you can employ professional trial consultants to assist you in preparing the presentations and recruiting a representative sample of jurors from the venue. If the case is small, it can still be worth your time to gather some of your internal support staff and pitch the case to them. The data you get from the latter may not be as reliable as data from the professionally facilitated version, but it will still be useful.

Conducting pre-trial research will identify useful information as to how potential jurors in the venue will problem-solve your fact pattern. This research should be useful in developing case themes, testing difficult evidence, and gauging mock jurors' perceptions of witnesses. This information gives you a working sense of how best to structure your case, the most appealing narrative order, thematic points to weave throughout, and strategies to highlight or mitigate evidence.

As early as possible, know the language of the charge. What the jurors will be asked can have a direct impact on the type of jurors you will seek to avoid. If you are able to employ pre-trial research, a modified version of the charge should be read to mock jurors, ensuring that key language is included. This allows researchers to more reliably assess how jurors employ their decision-making toward the claims, as well as which juror traits more closely align with the legal constructs of your case.

There is another important, and too often overlooked, benefit to research that is conducted with a professionally facilitated and representative sample of potential jurors from the venue: a research-based ideal/non-ideal juror profile. During the planning of any pre-trial research, some consideration should be given to what questions would be asked either in *voir dire* or on a supplemental juror questionnaire, if allowed by the Court. We ask all these questions on our intake questionnaire in the pre-trial research projects

we do. Gathering that data from a representative group of jurors (which also hears both sides of the case) can be an incredible advantage.

This research has the potential to yield a constellation of traits and characteristics that allow for the construction of a profile for ideal/non-ideal jurors. Although demographic characteristics are not always a reliable indicator of a juror's tendency to be ideal or non-ideal, when correlated with other, case-specific attitudinal factors, these statistics can be highly informative and provide counsel with traits to gauge more closely during *voir dire*. This can also give you a sense of which questions need to be asked and help you identify those that might be a waste of your precious *voir dire* time.

Sixty Days Before Trial:
The Court

It's important to get a sense of the judge and how he or she conducts jury selection. For planning purposes, it is critical to know the judge's preferences and operating patterns. We have worked in state courts where the judge allowed each side one hour for *voir dire* and then eight minutes to write down three strikes. The bailiff paced back and forth between counsel tables waiving a stop watch. Inversely, we have worked in state courts where the jury selection lasted weeks, the panel included over 600 prospective jurors, and we received the completed 37-page supplemental juror questionnaires weeks in advance.

Experiences in federal courts also vary. Some courts allow for attorney-led *voir dire*, while others ask for a list of potential questions submitted well in advance, to be asked at the judge's discretion. Some federal judges conduct *voir dire* with no feedback from counsel. We have seen judges flip a coin to determine alternate seats, request that attorneys make their preemptive strikes live in front of the venire, or pass a sheet of paper back and forth in a school yard pick. Can you strike "below the line?" Will you be striking from the box first and then addressing alternates separately? The process affects the strategy, and it is critical to gather information before engaging. Often, this information can be gleaned from other attorneys who have been in those courts, but there is no shame in asking the court directly, certainly at the pre-trial conference.

Voir Dire *strategy*

A judge's preferences during *voir dire* also affects the type of questions you can ask. Some judges are highly sensitive to an attorney's attempts to argue the case during *voir dire*, and we concur. In our experience, it is not a beneficial strategy regardless of the court's view. We find that argument masquerading as questions often do more harm than good because they make jurors uncomfortable. Jurors will be suspicious of vague hypothetical questions that they perceive are meant to trap them into giving the "right answer." Even more problematic, there is clearly a "right answer" to be given. Therefore, you are not eliciting accurate feedback regarding how a juror might actually think when presented the case—only the socially desirable answer in that moment.

One of the difficulties of effective *voir dire* is that it forces an attorney to ask open-ended questions that he or she doesn't know the answers to. While this may feel uncomfortable at first, it is a much more effective method for identifying bias, which is the main goal. Time is more wisely spent deducing how jurors think about pertinent case issues than asking questions with "right answers."

> As in most areas of life, knowledge is power in preparing a case for trial.

Particularly, when you have learned in your research that certain responses to certain questions correlate with non-ideal jurors, you can go into jury selection with a research-backed plan to identify those jurors you need to strike. Questions like "Who here would be highly unlikely to file a lawsuit even if you felt like you had been harmed?" produce more useful answers than "If your business partner breached a contract that you two had agreed upon, you would want to get them to pay you what was owed to you, right?" Who is going to answer no to that? What would you learn?

Supplemental Juror Questionnaire (SJQ)

Perhaps you've heard about them but never employed one yourself. It's possible you've heard that OJ Simpson's juror questionnaire was 75 pages. Perhaps you've heard a local judge in your area hates them, loves them, or writes them for use herself. When properly crafted and administered, supplemental juror questionnaires have the potential to increase the efficacy of *voir dire* for the parties and the court.

First, they have the potential to save time during jury selection. Ideally, SJQs should be administered in the week or days prior to trial and should contain background questions that assess a potential jurors' education, past job history, involvement in clubs and non-profits, knowledge of the parties involved, etc. Attorneys for both parties should thus review the questionnaire prior to jury selection and avoid asking blanket background questions to the entirety of the venire.

Instead, this time may be used to further explicate answers already given by potential jurors and flagged in advance by attorneys for follow-up. Be careful not to re-ask questions previously covered in the SJQ. This redundancy frustrates both the venire and the sitting judge, and it reflects poorly on the offending attorney.

Next, SJQs provide a roadmap of where additional follow-up and probing might be needed. A potential juror might indicate on the questionnaire that she would rate corporate entities as lacking complete credibility. Upon following up on her reasons for this belief, an attorney might find that she has an overwhelming prejudice, and a challenge for cause may be warranted. This provides a logical transition to ask the venire who else has similar feelings or has had similar experiences.

Oftentimes, jurors are more likely to accurately report their beliefs in a questionnaire. Social desirability bias innately leads jurors to want to answer in a way that is socially acceptable. It is a threat to face to admit in front of a panel of 60 strangers that you believe that if "someone is a defendant, that they must have done something to be sued." The questionnaire serves as a warm-up, completed in privacy, that allows jurors to speak their minds more freely without fear of judgment. In especially triggering situations, jurors may also mark portions of their questionnaire private. This allows the judge and attorneys to call that juror privately if follow-up is needed.

A supplemental juror questionnaire might not be an option in all cases. However, there are steps that can increase the likelihood of getting the court to grant a questionnaire.

Discuss the potential for a questionnaire with opposing counsel well in advance of trial. Agree that each side will work with one another to present an agreed upon final version of the SJQ to the judge for consideration at the pre-trial hearing. Trying to get the court involved in squabbles about a questionnaire all but guarantees that the court will reject the idea altogether. A short, one or two-page questionnaire is almost always best; economy of time spent in *voir dire* can be a big selling point to the court.

Settlement

Importantly, all the work that has gone into preparing the case for trial has also armed you with unique knowledge about "what a jury may do" with certain aspects of the case. Having done some kind of pre-trial research and considered the jury as a final fact finder puts you at a distinct advantage should you find yourself in the mediator's office around this time.

One Week Out:

More aptly called jury "deselection," the primary goal of *voir dire* is to identify your unfavorable jurors. Ideally, the research you've done leading up to this day will inform the questions you ask and the traits you are monitoring. The SJQ has allowed for advanced review of potential jurors and highlighted areas that require further explication. Still, it is important to create an outline of the areas that require additional examination.

Because your main goal is identifying non-ideal jurors, many of your questions should be designed to elicit answers that speak to the crux of your opponent's case, or even seem to bolster their claims. This can feel uncomfortable, but these questions are critical. It is important to flush out these beliefs and attitudes during *voir dire*. Instead of attempting to silence these potential jurors, thank them for their candor and ask who else on the panel shares these thoughts and experiences. Ask the question as if you are sure there are others and welcome their responses.

Attorneys are often afraid of "poisoning the well" in these situations. However, it is highly unlikely that a juror chooses to change long-held beliefs based on the thirty-second rantings of a stranger. Instead, this strategy allows you to identify others that may sympathize with the beliefs of a non-ideal juror. Identifying the prospective jurors who have attitudes and beliefs that align with your non-ideal juror profile is your primary goal in *voir dire*. Challenging for cause or using a peremptory strike can only be done if you know who they are.

As in most areas of life, knowledge is power in preparing a case for trial. All too often we see lawyers first considering jury selection the night before (well, at least the Friday before) they have to pick the jury. We think there is a better way.

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STRATEGIC USE OF APPELLATE COUNSEL

BY MARCY HOGAN GREER & ROGER D. TOWNSEND

APPEALS ARE MUCH MORE LIKELY TO CHANGE the result of a trial today than they were 20 years ago. This is true in Texas and in the federal court system. Changes in the law and a decreasing deference to jury verdicts have both affected reversal rates—especially in complex cases. As a result, the real end game is likely to occur in an appellate court. But to be in a position to successfully challenge or defend a jury verdict on appeal, trial lawyers need to ensure that the error has been adequately preserved, there is a sufficient record, and the harmful effect of the error has been established. It is therefore not surprising to see appellate lawyers—or "law" lawyers—becoming involved in pre-trial and at the trial, partnering with the trial lawyers to expertly cover all aspects of the trial.

With an effective strategy, the trial and pre-trial work supports the appeal, and the appellate perspective can help achieve and support the trial result. And having a "law lawyer" well-versed in the case as additional boots on the ground at trial can provide some significant strategic advantages when critical decisions need to be made quickly and without time for extensive research and reflection. The appellate lawyer can provide support or even handle directed verdicts, charge conferences, and the like, freeing the trial lawyer to focus on evidence presentation and jury argument.

Having both the trial and the appellate perspectives—the fact and law perspective—increases the client's ultimate chance of success.

A. Identifying Law Issues Early as a Template for Discovery and Presentation of Evidence

Winning the appeal often requires the right evidence. From the authors' perspective, we often see trial lawyers approach a case with too optimistic a view of how the courts will apply the law, only to find after trial that the appellate court applies a different legal standard that the evidence presented does not meet. Exploring the appellate possibilities early can help the trial team discover, develop, and present the best evidence to support the case on appeal. It can also make discovery more efficient by avoiding rabbit trails. Below are just a few examples.

1. Evidence to Support Legal Rulings

One example is summary judgment. The "law lawyer" can help identify what evidence is necessary to defeat a claim or defense in a traditional motion for summary judgment or create a fact issue to defeat a "no evidence" motion for summary judgment, directed verdict, JNOV, or legal sufficiency challenge on appeal.

The "law lawyer" also can help identify the evidence necessary to support other pretrial rulings, such as a special appearance to contest personal jurisdiction, a venue motion, or a motion for spoliation sanctions.

A draft jury charge may be the single best tool to identify the pivotal factual issues to develop in discovery, because an accurate draft charge shows the questions that the jury will be asked.

2. Effective Use of the Jury Charge

A draft jury charge may be the single best tool to identify the pivotal factual issues to develop in discovery, because an accurate draft charge shows the questions that the jury will be asked. It is critical that the "fact strategy" for the case be focused on these ultimate questions to be answered by the jury.

For a plaintiff, the elements of the liability and damages questions in the charge function as a roadmap for building the case. And for the defendant, developing the charge early helps identify the best opportunities to create holes in that case and to develop defenses.

Preparing the charge focuses attention on questions that need to be considered ***before*** discovery. But appellate lawyers are often brought into a case too late—often right before trial to draft the charge, when it is too late to raise new defenses or claims that might fit the facts. Preparing the charge early would prevent that sort of late revelation and help maximize the possibilities of discovery.

a. Identifying Key Words and Phrases
Jurors often struggle with the court's charge because it uses legal terms and phrases that are unfamiliar to jurors. Even when the charge defines those terms and phrases, it can still be difficult for jurors to understand this language and apply it to the facts. The problem is amplified when witnesses use different language for the same concept that ultimately appears in the charge.

Preparing a draft charge early helps the lawyers frame discovery questions using the language most likely be used in the charge. The answers will be more understandable and meaningful to the jury in light of the questions that they ultimately will be asked.

b. Expert Testimony
Similarly, it is critical to ask experts to answer the right questions. The best guide to the right questions is often the draft charge. When an expert provides an opinion applying the facts to one standard, but the charge asks the jury to answer based on a different legal standard, the jury may not know how to apply the expert opinion to their question. Worse still, the expert's answer about a different standard may not be legally sufficient evidence to support the submission of the question or may result in a directed verdict or reversal on appeal.

3. Summary Judgment
a. Ultimate Win
One reason that many cases are not won on summary judgment is that the winning legal argument is not identified until it is too late for summary judgment. A summary-judgment proceeding is the one part of the pretrial process that most resembles the appeal. Unlike rulings on many other issues, like evidentiary objections, the standard of review for a summary judgment is de novo—the same as at trial. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

Because of this similarity, a party seeking or resisting summary judgment can benefit greatly from the input of the "law lawyer." The "law lawyer" brings an appellate perspective to the legal analysis, the framing of the issues, the drafting of persuasive briefing, the researching of the law, and even the most effective formatting of the briefing, such as using a table of contents, index of authorities, argument headings, etc.

b. Partial Summary Judgment
We have seen many cases where a ruling on partial summary judgment helps a party win with the jury by narrowing the case, eliminating theories involving harmful evidence, or obtaining helpful jury instructions.

Always consider possible partial summary judgment rulings as a means to resolve before trial issues that are frequently resolved as a matter of law at trial or on appeal such as:

- establishing a contract interpretation;
- negating fiduciary duties;
- negating negligence and other tort duties;
- negating particular elements of damages, like lost profits;
- negating gross negligence and other theories that might entitle a plaintiff to exemplary or additional damages; and
- negating the availability of an affirmative defense.

4. Developing Expert Testimony and Cross-Examining Experts
Another example is one of the hottest appellate issues over the past few decades—the legal review of expert testimony for reliability, particularly when the testimony concerns scientific causation. Texas appellate courts have engaged in the exacting review of expert testimony to determine whether opinions have sufficient scientific support. *See, e.g.*, *Bustamante v. Ponte*, 529 S.W.3d 445, 456 (Tex. 2017); *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 861 (Tex. 2017); *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637–43 (Tex. 2009). And the consequences can be fatal: "[A]n opinion is conclusory and cannot be considered probative evidence if it lacks a factual basis or is made in reliance on a basis that does not support the opinion," even if no objection is made at the time of the testimony. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 717 (Tex. 2016).

Developing effective scientific expert testimony requires not only knowledge of science, but also knowledge of the law. The "law lawyer" can help provide a roadmap for what type of scientific studies and support might be necessary to meet the legal standard.

5. Pre-Trial Appellate Proceedings
a. Interlocutory appeals
Ordinarily, a party may appeal only a final judgment. But many exceptions are created by statute. *See* TEXAS PRACTITIONER'S GUIDE TO CIVIL APPEALS 113-133 (Robert Dubose ed. 2014) (cataloguing types of interlocutory appeals). These statutes allow some interlocutory rulings to be appealed immediately, without waiting for trial and judgment.

One relatively new and under-utilized type of interlocutory appeal can help change the shape of trial—the permissive appeal of a ruling on a controlling question of law. TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. This procedure requires both the trial court and appellate court to grant permission and involves a number of steps. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(f).

Although this procedure is cumbersome and time consuming, it can help shape the issues—or in some cases effectively dispose of the case—before an even more time-consuming trial. For instance, petitions for interlocutory review have been granted in the following situations:

- To review the denial of summary judgment in a medical malpractice case to clarify the standards for the substantial factor element of proximate cause and "willful and wanton negligence." *Ho v. Johnson*, No. 09–15–00077–CV, NO. 09–15–00077, 2016 WL 638046, at *5 (Tex. App.—El Paso Feb. 18, 2016, pet. denied).
- To determine choice of law. *See Am. Nat. Ins. Co. v. Conestoga Settlement Trust*, 442 S.W.3d 589, 593 (Tex. App.—San Antonio 2014, pet. denied).
- To review the denial of a motion for summary judgment and determine whether a plaintiff could invoke the open-courts provision to assert a claim otherwise barred by the statute of limitations. *Gale v. Lucio*, 445 S.W.3d 849, 852 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). The court of appeals' reversal of the trial court's order denying summary judgment disposed of the litigation. *Id.* at 858.

b. Mandamus

As appellate lawyers, the authors more often advise trial lawyers not to pursue a petition for writ of mandamus before trial than we recommend pursuing mandamus relief. The requirements for mandamus are notoriously difficult, and the chances of success are usually very low. But in some limited circumstances, a mandamus proceeding can be the only solution to a disastrous pre-trial ruling.

Discovery rulings are typically reviewed by mandamus. But other types of pretrial rulings include:

- Order denying a Rule 91a motion to dismiss, *In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding);
- Order that compels apex deposition. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 176 (Tex. 2000) (orig. proceeding);
- Order that compels disclosure of trade secrets (because once disclosed the injury cannot be cured on appeal), *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding);
- Imposition of death-penalty sanctions, *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding);
- Venue rulings based on mandatory venue provisions, TEX. CIV. PRAC. & REM. CODE § 15.0642; *see also In re Fisher*, 433 S.W.3d 523, 528–29 (Tex. 2014) (orig. proceeding);
- Order denying a forum non conveniens motion, *In re Ford Motor Co.*, 442 S.W.3d 265, 269 (Tex. 2014) (orig. proceeding).
- Order refusing to enforce forum-selection clause, *In re AIU Ins. Co.*, 148 S.W.3d 109, 117–18 (Tex. 2004) (orig. proceeding);
- Order refusing to enforce contractual waiver of jury trial, *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138–39 (Tex. 2004) (orig. proceeding).

6. Pre-Trial Rulings on Charge Wording

Most lawyers save argument about the jury charge for the charge conference. Yet the charge conference is often a less-than-optimal time to convince the court to rule as a matter of law, especially in a long trial.

Consider arguing select parts of the charge before trial at a Rule 166 pretrial conference. *See* TEX. R. CIV. P. 166. A pretrial conference is an ideal time to resolve and narrow purely legal disputes before trial that can be decided as a matter of law without hearing disputed evidence. Rule 166 can be used "to simplify and shorten the trial . . . ." *Provident Life & Acc. Ins. v. Hazlitt*, 216 S.W.2d 805, 807 (Tex. 1949) (citing prior version of Rule 166).

The authors have used a Rule 166 conference as a means to decide purely legal issues bearing on the charge such as (1) choice of law, (2) whether a cause of action is valid in Texas, and (3) the wording of a charge instruction about the measure of damages. In one of our recent cases, a court decided a dispute over the proper charge wording for the measure of damages pretrial, which reduced plaintiff's claimed damages model from over $80 million to less than $1 million. The case settled promptly, before trial.

7. Trial on an Unsettled Legal Theory

In many cases, the governing law is clear cut. But in other cases, the law remains undeveloped or unsettled. For instance, many legal issues regarding who owes which

fiduciary duties remain unresolved in Texas. Similarly, law previously thought settled can change. One of our partners participated in five different trials between 1999 and 2014 in cases involving common-law claims of shareholder oppression in closely held corporations based on a long line of appellate decisions. Yet in 2014 the Texas Supreme Court held that no such cause of action exists in Texas. *Ritchie v. Rupe*, 443 S.W.3d 856, 891 (Tex. 2014).

B. Ensuring a Proper Record

A trial court error can be meritorious and preserved by a timely objection or request, yet lost on appeal because of "holes" in the appellate record. In the heat of battle, pieces of the record may not be fully protected. In trial and at hearings that may result in an appealable ruling, it is critical to remember the appeal and make a proper record.

For example, court reporters often do not record deposition transcripts that are played or read to the jury. The authors have experienced more than one case in which the transcript reflects "Deposition testimony read/played to the jury," with no recordation of the questions and answers the jury actually heard (and saw). This problem can be avoided with advance preparation.

Another example is charge tenders, which are typically submitted directly to the trial judge in the courtroom and often do not make it into the official clerk's record. If the appealing party had the burden to tender a correctly stated question or instruction, but cannot prove which one was actually handed to the judge, the error is forfeited. It is not unusual in a complicated case to be drafting and refining charge tenders in court during or between charge conferences as necessary to incorporate or respond to the court's rulings and respond to the opposing party's proposals. Months after verdict, it can be difficult to remember which version of a charge tender was actually provided to the judge. A "law lawyer" can ensure that the record is complete.

Under Texas Rule of Appellate Procedure 34.5(e), the parties may by written stipulation supplement the record to include items that were lost or destroyed. Otherwise, the party has to file a motion with the trial court to determine the accuracy of the item that cannot be located, which can be perilous without adequate assurance of what was actually proffered to the judge at the time of trial.

C. Preserving Appellate Argument

There are a number of useful practice materials that provide guidance for error preservation for appeal. *See, e.g.*, TEXAS PRACTITIONER'S GUIDE TO CIVIL APPEALS, Ch. 1. There are specific requirements for each type of error preservation. "But the best way to prepare for preservation decisions in the heat of battle is to understand the philosophical underpinnings of preservation practice, as well as the basic contours for preservation procedure." *Id*. at 1.

It is also important to know your case. We strongly recommend preparing early in your pre-trial a comprehensive memo that analyzes the larger themes and important nuances of the claims and defenses that will be tried. Such a memo helps unite and organize the trial team and provides an important tool for turning out quickly trial briefs, motions for directed verdict, charge instructions, and the like during intensive trial periods. It also allows for a consistent message on evidentiary and substantive issues that the can help ensure that errors are preserved at each stage of the litigation process. The appellate lawyer is probably best positioned to prepare and use the memo, but all team members should have input as to the substance and themes.

1. Jury Charge

The charge conference is a particularly critical juncture for preserving and waiving error. The stakes are high: absent a proper and timely objection to the charge, the evidence will be measured against what the charge said the law was, regardless of whether the court's statement of the law is correct. *See, e.g.*, *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001). And, although the Texas Pattern Jury Charges are often cited and relied upon by many courts, they are not always right. *See, e.g.*, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44–45 (Tex. 2007); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 n.52 (Tex. 2002); *Plas-Tex, Inc. v. U.S.A. Steel Corp.*, 772 S.W.2d 442, 443–44 n.4 (Tex. 1989).

Further, the cases governing charge practice have made a difficult situation even harder. In 1992, the Texas Supreme Court indicated that:

> The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer. Today, it is fair to say that the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial.

State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d

235, 240 (Tex. 1992). Most practitioners would agree that charge practice has only increased in difficulty since that time.

Many comprehensive papers have been written on preserving error at the charge conference. *See, e.g.*, TEXAS PRACTITIONER'S GUIDE TO CIVIL APPEALS, 17-20; Marcy Hogan Greer, *Preserving Error in the Court's Charge*, STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE (2010). This paper will not attempt to replicate their guidance. But there are a couple of strategic points and decisions that merit discussion here.

There are different schools of thought as to whether it is best to request a "dream charge" or a more "mainstream" charge in your initial proposal to the court. Some practitioners see advantages in presenting a "dream charge" in that it may be more likely to push the court closer to your theory of the case and provides an opportunity to negotiate from that vantage point. Others feel that a more balanced charge gives them more credibility with the court and facilitates the time-consuming process of deriving an appropriate charge.

Further, many judges, both federal and state, are holding "informal" charge conferences that are not on the official trial record where the parties are expected and permitted to give and take on charge issues. Courts have found these conferences to be productive to narrow and focus the issues for trial and then use the formal charge conference simply to preserve error. The risk with informal conferences is that nothing is preserved unless you later make a record. As a practical matter, any errors can and should be preserved at the formal charge conference, but usually by that point, the court is simply allowing the parties to make a record and rarely makes further changes except to correct clerical errors. And of course, the charge conference typically occurs at the very end of the trial when tensions are high and a number of other strategic decisions—such as winding up the case and closing arguments—are also being made.

With these tactical and technical considerations in mind, it makes a great deal of sense to have at least one member of the trial team laser-focused on preserving the critical issues while at the same time obtaining the best possible charge.

2. Post-verdict

Post-verdict motion practice is also highly technical and often tedious after the long trial is over. It is very important, however, as it can be the last possible—and in some cases the only—chance to preserve certain errors. *See* TEXAS PRACTITIONER'S GUIDE TO CIVIL APPEALS, Chapters 24-27.

Some practitioners file "laundry list" post-trial motions that formulaically recite the jury's findings and the lack of evidentiary support for them. The authors do not recommend this practice. Instead, they urge trial lawyers to take full advantage of the post-trial phase to brief the issues—regardless of whether you are challenging or defending the jury's findings and claimed errors in the trial. The post-trial phase provides an excellent opportunity to look at the case with fresh eyes through the lens of the jury's verdict and advocate through your post-verdict motions. Though the likelihood of any relief from these motions is remote, the opportunity for refining the appellate issues and honing the arguments should never be wasted.

D. Showing Harm

To reverse a judgment on appeal, the complaint must not only be preserved, but the error must have been harmful—as shown by the record. *See* TEX. R. APP. P. 44.1. There often are maneuvers to increase or lessen the effect of an erroneous ruling. An appellate lawyer is ideally situated to advise a trial lawyer about ways to ensure that the error caused a sufficiently detrimental harm to the party's rights as to warrant reversal.

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LESS MAY BE MORE: DISCOVERY IN 2018—FOCUS ON EFFICIENCY AND LIMITING COSTS

BY CARLOS R. SOLTERO

DISCOVERY IN TEXAS DISPUTES TODAY MAY BE summed up by the Rolling Stones' classic lyrics: "*You can't always get what you want. But if you try sometimes, well, you might find, you get what you need*." Ideally in discovery, you would get everything you want. You would have the opportunity to go back through time and sort through every communication (frequently e-mail, text, Slack, Facebook messaging, or some other electronic communication, to name a few), each piece of metadata showing each revision to key documents, and video footage or other recordings of the parties' conduct.

In reality, rule changes and recent case law require lawyers to think through discovery issues in new ways because we often do not get what we would ideally want.[1] Nowadays, clients also pressure lawyers to take a more thoughtful approach to avoid incurring the costly fees associated with broad-sweeping discovery. Artificial intelligence and improved technology enabling more streamlined searches have already transformed some of the ways we approach discovery, and will certainly continue to do so. Here are ten thoughts on efficiency and limiting discovery costs.

Rule changes and recent case law require lawyers to think through discovery issues in new ways because we often do not get what we would ideally want.

1. Plan ahead. Drafting a jury charge or memorandum of law stating claims and defenses early in a case can be an important and helpful tool, particularly in any complex case, in multi-claim cases, or cases involving causes of action one does not deal with on a daily or weekly basis. Whether resolution of the dispute will be by jury trial, bench trial, arbitration, dispositive motion(s), or settlement, understanding the key elements of proof remains a cornerstone of discovery strategy for a given case.

2. Use pleadings to manage discovery. Each side's pleadings outline the contours of the dispute filed at the courthouse. Texas Rule of Civil Procedure 192.3(a) directly references the "claim or defense of the party seeking discovery or the claim or defense of any other party" as the general scope of discovery. Case law supports this as well.[2] One can choose—either as a plaintiff or a defendant—to limit the dispute by limiting one's own pleadings, regardless of what an opponent does. Special exceptions may also be useful in some cases to clarify pleadings and the scope of discovery.[3]

3. Don't forget the cheap and effective "low-hanging fruit" that may include self-executing provisions. Three examples to remember sending are: (1) Texas Rule of Civil Procedure 194 requests for disclosures; (2) trial interrogatories asking for trial witnesses;[4] and (3) targeted requests for admissions that, if not timely answered, are deemed admitted.[5] Sending early interrogatories on threshold issues may be an option depending on the type of case.[6]

4. Proportionality is the buzzword from the 2015 amendments to the Federal Rules of Civil Procedure governing discovery. Federal judges take this change seriously. The Texas Supreme Court's jurisprudence and the Texas rules have included similar concepts for some time.[7] As the Texas Supreme Court noted this year, the 2015 amendments to the federal rules were directed to change "the existing 'mindset' that relevance is enough, restoring proportionality as the 'collective responsibility of the parties and the court.'"[8] Not every case warrants massive discovery requests.

5. Confer with the opposing side about discovery, particularly ESI. Federal Rule of Civil Procedure 26(f) conferences include conferences on electronic discovery, including who the relevant custodians are, what search terms will be included, and other agreements on the scope of ESI discovery. Such conferences are also good practice for proper cases in state court. To the extent not already done, this type of conference also provides a good opportunity to request preservation of information and/or a litigation hold. The Texas Supreme Court recently noted that the proper approach to ESI discovery is that the requesting party must specify the desired form of production (e.g., native), but all discovery is subject to scrutiny

for proportionality and "the reasonableness standard to which our electronic discovery rule is tethered." [9] The Texas Supreme Court applied a seven-factor test to assist in the case-by-case balancing as part of the proportionality inquiry.

6. Use technology to further your causes of efficiency and cost-effectiveness. Predictive coding, word searches, and other electronic methods can greatly streamline review of large document productions. Electronic exhibits, Skype or other video teleconferencing services, and other innovations can reduce the need to travel for out-of-town depositions and can ease the time and expense of developing exhibit lists for trial. The Internet or database research can also sometimes yield useful information through informal discovery.

7. Another source of potentially useful information is non-party or third-party discovery. Open records or FOIA requests to governmental entities that have information relevant to the dispute are one useful and cost-effective tool. Simply calling non-parties and asking about potentially relevant information can also yield useful material that may be used in discovery or may result in affidavits or deposition testimony. Typically, the ability to obtain this information through subpoenas can be challenging with noncooperative non-parties given the limited options to compel cooperation[10] and with courts often reluctant to hold those non-parties in contempt. Accordingly, one may consider paraphrasing the advice from Jack Nicholson in *A Few Good Men*: in order to obtain records, one should "ask nicely."

8. Motion practice also goes hand-in-hand with a cost-effective discovery strategy. Texas practice has changed considerably with the pervasive use of no-evidence summary judgments (Texas Rule of Civil Procedure 166a(i)) and more recently with the early dismissal practices of Texas Rule of Civil Procedure 91a and the Texas Citizens' Participation Act. The early dismissal practices of Rule 91a, the TCPA, and older procedures like the plea to the jurisdiction provide a "first round" of narrowing of the legal issues that often may impact discovery in a case. Relatedly, in non-compete, trade secret, receivership and similar disputes, injunction situations are great opportunities to try cases to the bench, early on in a case without full discovery, and give the parties a significant preview into what an ultimate trial on the merits may look like. Accordingly, obtaining proportionate, relevant pre-injunction discovery can be an extremely valuable tool both in terms of determining what is really important and what remains to be discovered.

9. Two other recent changes that may be overlooked are Texas Rules of Civil Procedure 169 and 190.2, which apply to expedited actions under $100,000. Rule 190.2 limits each side to no more than six hours of depositions and 15 interrogatories. Nothing prevents parties from modifying discovery by a Rule 11 agreement, even in larger disputes, to limit discovery to minimize the costs to both sides. Variants of this occur in arbitration proceedings as well.

10. Consider the underutilized Texas Rule of Civil Procedure 166a(e) as a discovery tool. In cases that have not been fully adjudicated by summary judgment, Rule 166a(e) expressly authorizes trial courts to "interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just."[11] If a case is partially, but not fully, resolved by summary judgment, the trial court has the discretion to make this type of order, which may guide or limit the scope of discovery after the summary judgment determination.

These ten items are just a few focused strategic approaches that may significantly reduce the discovery burdens and costs in a case, which benefits all involved in the process. Enacting these and other strategies early on may help you get what you ***need*** to effectively advocate in particular cases.

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[1] *See, e.g.*, FED. R. CIV. P. 26(b)(1) (defining the scope of discovery to incorporate proportionality considerations); *In re State Farm Lloyds,* 520 S.W.3d 595, 609, 615 (Tex. 2017) ("[T]he simple fact that requested information is discoverable does not mean that discovery must be had. . . . Today, we elucidate the guiding principle informing the exercise of discretion over electronic-discovery disputes, emphasizing that proportionality is the polestar.") (citation omitted); *In re M.*, No. 09-12-00179-CV, 2012 WL 1808236 at *2 (Tex. App.—Beaumont 2012, no pet.) (per curiam) (mem. op.) (trial court abused its discretion in SAPCR case by admitting physical cell phone into evidence rather than a Rule 75b(a) reproduction of the relevant data and by ordering production for subsequent use without following *In re Weekley Homes* protocol); TEX. R. CIV. P. 192.4.

[2] *In re Alford Chevrolet-Geo,* 997 S.W.2d 173, 180 n.1 (Tex. 1999); *see also In re Booth*, No. 14-14-00637-CV, 2014 Tex. App. LEXIS 11536 at *3 n.3 (Tex. App.—Houston [14th Dist.] Oct. 21, 2014, no pet.) (per curiam) (mem. op.) (referencing that scope of discovery is measured by the *live* pleadings).

[3] *In re Memorial Hermann Hosp. Systems*, 464 S.W.3d 686, 707 (Tex. 2015).

[4] *Dareida v. Nat'l Distribs.*, No. 05-04-00307-CV, 2015 Tex. App. LEXIS 3168 (Tex. App.—Dallas Apr. 28, 2005, pet. denied) (trial

court erred in allowing witness to testify at trial where sponsoring party failed to identify him as a "trial witness" as opposed to a "person with knowledge of relevant facts" and noting the difference in rules 192.3(c) and 192.3(d)).

[5] TEX. R. CIV. P. 198.2(c), 215.4.

[6] *See e.g., United Servs. Auto Ass'n v. Mitek Sys, Inc.*, No. SA-12-CA-282, 2013 WL 1867417 at *1 (W.D. Tex. Apr. 24, 2013) (identification of trade secret as threshold discovery issue); *StoneEagle Services, Inc. v. Valentine*, No. 3:12-CV-1687-P, 2013 WL 9554563, at *2 (N.D. Tex. June 5, 2013) (the court "agrees with those courts requiring plaintiffs, in appropriate cases, to describe with reasonable particularity the alleged trade secrets that form the basis of their claim").

[7] *In re State Farm Lloyds*, 520 S.W.3d at 614 ("Though the proportionality factors were recently relocated within the federal rules, proportionality has long been a required constraint on the scope of discovery . . . ."); *In re Alford Chevrolet-Geo*, 997 S.W.2d at 180.

[8] *In re State Farm Lloyds,* 520 S.W.3d at 614 nn.77-78.

[9] *Id.* at 599 n.5.

[10] *See e.g., In re Suarez & Texas Dept. of Fam. & Protective Servs*, 261 S.W.3d 880, 883 (Tex. App.—Dallas 2008, no pet.) ("[T]he rule provides for enforcement . . . through contempt, not sanctions."); TEX. R. CIV. P. 176.8, 215.2(a) & (c).

[11] TEX. R. CIV. P. 166a(e).

EXPERT COMMUNICATIONS AND DRAFT REPORTS: KEY DISCOVERY DISTINCTIONS BETWEEN STATE AND FEDERAL COURTS IN TEXAS

BY BLAYNE R. THOMPSON & MARIA WYCKOFF BOYCE

THE DISCOVERABILITY OF COMMUNICATIONS between counsel and retained experts varies with venue. The Federal Rules of Civil Procedure changed on December 1, 2010, to protect draft reports and communications with experts from discovery. In contrast, the Texas Rules of Civil Procedure continue to subject these documents to discovery. Although the Federal Rules and the Texas Rules have now differed for seven years, some practitioners are still not fully aware of their distinctions, which can be costly in either court system. Attorneys who practice primarily in Texas state courts tend to carry the more burdensome state court practices into Federal Court, where they are largely unnecessary, thereby sacrificing efficiency and increasing costs for their clients. On the other hand, unwary federal practitioners taking their first journey into Texas state courts may not realize that their experts' draft reports and communications are discoverable until it is too late. Accordingly, it is vital for all practitioners to be well versed in these important distinctions.

Although the Federal Rules and the Texas Rules have now differed for seven years, some practitioners are still not fully aware of their distinctions, which can be costly in either court system.

FEDERAL COURTS

The Federal Rules explicitly shield from discovery draft expert reports and, with three exceptions specified in Federal Rule of Civil Procedure 26(b)(4)(C), all communications between an attorney and a retained expert.[1] The three exceptions are communications that: (i) relate to the expert's compensation; (ii) identify facts or data provided by the party's attorney and considered by the expert in forming her opinions; or (iii) identify assumptions provided by the party's attorney that are relied upon by the expert in forming her opinions.[2] No discovery is authorized beyond these three specific topics, and even if a communication touches on one of these topics, all other portions of the communication remain protected.[3]

The bookend exceptions are easily understood. The first exception encompasses discussions of how the expert is being paid. The third exception "is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed." [4] For example, if the attorney instructed the expert to assume the truth of certain testimony or evidence or to assume the correctness of another expert's conclusions, the communications containing those instructions are discoverable. However, the Advisory Committee Notes make clear that this third exception is limited: "More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception."[5]

The second exception to Fed. R. Civ. P. 26(b)(4)(C) is more problematic. The Advisory Committee Notes clarify that this exception "applies only to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected."[6] This limiting language is intended to guard from discovery any theories or mental impressions of counsel by limiting disclosure to only the facts themselves, presumably allowing attorneys to redact from production any surrounding non-factual context giving color to those facts.[7]

This limitation raises a number of questions. For example, what if the attorney's description of the facts is worded in such a way that renders the facts and impressions inseparable? And, if "identifying" is to be taken literally, does this exception require the disclosure of only the first mention of each fact? The Advisory Committee Notes inject further ambiguity into the scope of this exception, stating that the phrase "facts or data" is to be interpreted broadly to require disclosure of any material considered by the expert that contains "factual ingredients."[8] Courts have held that the term "factual ingredients" is broader than just "facts or data," but the precise definition is still open for interpretation.[9]

It is also important to note that the second exception to Fed. R. Civ. P. 26(b)(4)(C) extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not just those relied upon by the expert.[10] Attorneys should be cautioned against trying to get around this exception by identifying facts to an expert through edits to a draft report. Courts have considered such edits to be a "communication" subject to the same disclosure requirements.[11]

Discovery regarding attorney-expert communications on subjects outside the three identified exceptions of Fed. R. Civ. P. 26(b)(4)(C) is permitted only in the rare case in which a party establishes that it has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship.[12] Even in the unique situation in which such a showing can be made, courts still must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories.[13]

The protections afforded by the Federal Rules extend only to communications with experts who are required to provide a report under Rule 26(a)(2)(B).[14] Attorneys should continue to use caution in communicating with testifying expert witnesses who are only required to submit disclosures under Rule 26(a)(2)(C).

Finally, non-testifying or "consulting" experts generally enjoy complete protection from discovery in Federal Court, absent the rare showing of exceptional circumstances under which it is impracticable to obtain the facts or opinions by any other means.[15]

TEXAS STATE COURTS

In stark contrast to the Federal Rules, Texas has held steadfast to its traditional rules governing expert communications. Under the Texas Rules of Civil Procedure, few protections from discovery exist with respect to expert witnesses. Lawyers who are unfamiliar with Texas practice can run into trouble in this area without proper preparedness. Not only is it important to know the rules in considering the content and method of expert communications, but a lawyer could potentially face sanctions if her expert fails to save draft reports or other work product.[16]

The Texas Rules of Civil Procedure allow opposing parties to discover an expert's opinions and the facts that "relate to or form the basis of" those opinions, as well as "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony."[17] This rule has been widely interpreted to be all-encompassing; all drafts of expert reports and any written communications with a testifying expert are subject to discovery.

In addition, otherwise privileged documents, such as documents containing attorney work product, lose their protected status when disclosed to a testifying expert.[18] Such discoverability does not depend on whether an expert has *relied* on a document or if the expert has even *reviewed* it; merely providing a document to a testifying expert waives privilege and renders the document discoverable.[19]

Furthermore, the snap-back remedy of Tex. R. Civ. P. 193.3(d) that can be used to retrieve inadvertently produced privileged documents is not available in the expert context. Once privileged documents have been provided to a testifying expert, the only way to prevent disclosure of those privileged documents is by withdrawing the expert's designation as a testifying expert.[20]

Communications with "consulting" experts are not necessarily sacred either.[21] The Texas Rules provide that the "identity, mental impressions, and opinions of a consulting expert *whose mental impressions and opinions have not been reviewed by a testifying expert* are not discoverable."[22] However, if the consulting expert's "mental impressions" or "opinions" are reviewed by a testifying expert, the consulting expert is subject to the same discovery as a testifying expert.[23] Attorneys should therefore proceed with caution before revealing to a testifying expert any thoughts or opinions held by a consulting expert.

CONCLUSION

The Federal Rules offer broad protection to drafts of expert reports and communications between attorneys and experts, although the full extent of that protection continues to develop in the case law. Texas may eventually follow suit, but, until then, virtually all expert communications and draft reports are discoverable. As a result, attorneys litigating in Texas state court should consider entering into a written agreement with opposing counsel to exclude all draft reports and communications with experts from discovery. If such an agreement cannot be reached, it is important to know how to navigate the choppy discoverability waters.

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[1] FED. R. CIV. P. 26(b)(4)(B) and (C).
[2] FED. R. CIV. P. 26(b)(4)(C).
[3] FED. R. CIV. P. 26(b)(4)(C), Advisory Committee Notes, 2010 Amendments.
[4] *Id.*
[5] *Id.*
[6] *Id.* (quotations in original).
[7] *See* FED. R. CIV. P. 26(a)(2)(B), Advisory Committee Notes, 2010 Amendments; FED. R. CIV. P. 26(b)(4)(C), Advisory Committee Notes, 2010 Amendments; *Windowizards, Inc. v. Charter Oak Fire Ins. Co.,* No. 13-7444, 2015 WL 1402352, at *2 (E.D. Pa. 2015) (requiring redaction of all portions of a letter from counsel to expert witness not identifying facts or data).
[8] FED. R. CIV. P. 26(a)(2)(B), Advisory Committee Notes, 2010 Amendments.
[9] *See, e.g., Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a)*, 735 F.3d 1179, 1187 (10th Cir. 2013) ("[M]aterials containing 'factual ingredients' include far more than materials made up solely of 'facts or data.'").
[10] FED. R. CIV. P. 26(a)(2)(B), Advisory Committee Notes, 2010 Amendments.
[11] *See, e.g., United States Commodity Futures Trading Comm'n v. Newell,* 301 F.R.D. 348, 353 (N.D. Ill. 2014) ("Arguably, facts, data or assumptions provided by an attorney to the expert should not be insulated from production simply because the vehicle of communication was a draft of the report or an attorney's revision to the expert's draft.").
[12] FED. R. CIV. P. 26(b)(4), Advisory Committee Notes, 2010 Amendments.
[13] *Id.*
[14] *Id.*
[15] FED. R. CIV. P. 26(b)(4)(D).
[16] *Vela v. Wagner & Brown, Ltd.,* 203 S.W.3d 37, 58 (Tex. App.—San Antonio 2006, no pet.) ("An expert is required to preserve his work product and the party who retained the expert may be sanctioned if the expert destroys his work product.").
[17] TEX. R. CIV. P. 192.3(e).
[18] TEX. R. CIV. P. 192.5(c)(1).
[19] *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 438 (Tex. 2007).
[20] *Id.* at 440–41, 445.
[21] The Texas Rules of Civil Procedure define a "consulting expert" as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7(d).
[22] TEX. R. CIV. P. 192.3(e) (emphasis added).
[23] *Id.; Vela v. Wagner & Brown, Ltd.,* 203 S.W.3d 37, 58 (Tex. App.—San Antonio 2006, no pet.).

DISPOSITIVE MOTIONS IN STATE COURT

BY JUDGE KARIN CRUMP & VASU BEHARA

WHILE MOST LITIGATORS IMPLEMENT DISPOSITIVE motions in their trial strategy, the best advocates carefully consider the procedural posture of the case, the burden of proof, the standard of review, timing, deadlines, court resources, and cost-shifting before filing those motions. The strategic use of dispositive motions can provide your client with early momentum in a case, educate the court on the facts and legal issues in the case, and eliminate some or all claims and defenses. The purpose of this article is to provide you with a roadmap of dispositive-motion options, as well as considerations to help you avoid bumps in the road to trial.

I. Motion for Default Judgment

While it may be tempting to race to the courthouse to secure a quick judgment, the *Craddock* test requires that a default judgment be set aside and a new trial ordered when the defaulting defendant: (1) shows that the failure to appear was not intentional or the result of conscious indifference, but was due to an accident or mistake; (2) sets up a meritorious defense; and (3) shows that a new trial would cause neither delay nor work an injury to the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939).

> The Rule 91a Motion to Dismiss is one of the earliest "merits" type motions available under the Texas Rules of Civil Procedure.

The record must affirmatively show strict compliance with the Rules of Civil Procedure or applicable statute; otherwise, the attempted service of process is invalid. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1984). Even actual notice without proper service will not overcome this requirement and place the defendant under any duty to answer. And the issue of defective service may be raised for the first time on appeal. *Hubicki v. Festina*, 226 S.W.2d 405, 408 (Tex. 2007). Before seeking default, ensure that the court file includes the citation, return of service, military-service affidavit, and the certificate of last known address. Both the citation and the officer's return of service are required to be on file with the clerk of the court for at least ten (10) days. TEX. R. CIV. P. 107, 238, 239.

The standard of proof required in a default judgment case is the same as that in a contested case. Damages awarded in a default judgment cannot exceed those pleaded for in the petition. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 410 (Tex. 1986). If the facts alleged against a defendant do not, as a matter of law, create liability against the defendant, then the failure to file an answer cannot create that liability. *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917, 919 (Tex. App.—Corpus Christi 2003, no pet.). A default judgment is also erroneous if the petition alleges a claim against one defendant, but the default judgment is entered against a different defendant. *KAO Holdings, L.P. v. Young*, 261 S.W.3d 60 (Tex. 2008). Texas Rule of Civil Procedure 243 requires that a court hear evidence of unliquidated damages. Unliquidated damages in a default judgment may be subject to an attack that they are legally insufficient evidence to support consequential damages. *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 85–86 (Tex. 1992). A plaintiff is also required to prove the connection between the liability and the injury, despite the defendant's default. *Henry S. Miller Co. v. Hamilton*, 813 S.W.2d 631, 634 (Tex. App.—Houston [lst Dist.] 1991, no writ).

II. Motion to Dismiss for Improper Forum

Forum pertains to the jurisdiction where suit may be brought. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005) (explaining that before a defendant is subject to specific jurisdiction in a particular state, the defendant must purposefully avail itself "of the privilege of conducting activities within the forum State . . . ."). Under Texas law, contractual forum-selection clauses are enforceable unless shown to be unreasonable and may be enforced through a Motion to Dismiss. *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004).

A trial court that refuses to enforce such an agreement abuses its discretion absent clear evidence that: "(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would

contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial." *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231–32 (Tex. 2008) (per curiam) (citing *AIU Ins. Co.*, 148 S.W.3d at 112).

A forum-selection clause may be waived, and it would ordinarily be "unreasonable or unjust" for a court to enforce a forum-selection clause after it has been waived. On appeal, the determination of "waiver," which consists of the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right, is closely scrutinized. *See In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 722 (Tex. 2016); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam). The waiver test embodies aspects of estoppel and provides: "A party waives a forum-selection clause by substantially invoking the judicial process to the other party's detriment or prejudice." *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998). Substantial invocation and resulting prejudice must both occur to waive the right. *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex. 2008); *Automated Collection Techs.*, 156 S.W.3d at 559. Whether litigation conduct is "substantial" depends on context and is determined on a case-by-case basis from the totality of the circumstances. *Perry Homes*, 258 S.W.3d at 591–93. Thus, delay alone is generally insufficient to establish waiver. *In re Vesta Ins. Grp.*, 192 S.W.3d 759, 763 (Tex. 2006).

In contrast to forum, venue concerns the geographic location within the forum where the case may be tried. *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Venue may and generally does refer to a particular county, but may also refer to a particular court."). Venue must be challenged by a Motion to Transfer Venue filed before or concurrently with the defendant's answer. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063. In the absence of a timely filed motion to transfer venue, the defendant's objection to improper venue is waived. TEX. R. CIV. P. 86(1); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000). Venue selection cannot be the subject of private contract unless otherwise provided by statute. *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972). Finding a basis for a Motion to Dismiss for Improper Venue is challenging for even the most seasoned litigator.

III. Motion to Dismiss under TRCP Rule 91a

The Rule 91a Motion to Dismiss is one of the earliest "merits" type motions available under the Texas Rules of Civil Procedure. From a procedural perspective, the Court must rule within 45 days of the filing of the Motion to Dismiss. The Court may rule by submission and is not required to conduct an oral hearing. See *id.* R. 91a.6. While a trial court that does not comply with the forty-five day deadline is in error, the court's non-compliance with the mandatory language of the rule will not result in reversal if the error is found to be harmless. *Koenig v. Blaylock*, 497 S.W.3d 595 (Tex. App.—Austin 2016, no pet.).

Except with regard to the award of costs and attorney's fees to the prevailing party, "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by" the rules of civil procedure. *Id.* R. 91a.6. In analyzing the standard of review for 91a motions, a court must determine whether the pleader has alleged facts demonstrating jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). In that context, the court construes the pleadings liberally in favor of the plaintiff, looks to the pleader's intent, and accepts as true the factual allegations in the pleadings to determine if the pleader has alleged facts that affirmatively demonstrate the trial court's jurisdiction over a claim. *Id.* at 226.

Rule 91a also requires the court to determine whether a "reasonable person could believe the facts pleaded" to determine whether a pleading has a basis in fact. TEX. R. CIV. P. 91a.1. This language is similar to a legal-sufficiency challenge. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Legal sufficiency is a question of law that an appellate court considers *de novo. See id.* at 822, 827. Given the liberal construction of the pleadings standard and faced with having to pay fees if the court denies the motion, a litigant might consider filing Special Exceptions under Rule 91 (which has a cost-shifting provision) before filing a 91a motion.

IV. TCPA (Anti-SLAPP) Motion to Dismiss

Litigators are unlikely to find a dispositive motion that is more fraught with land mines than a TCPA (Texas Citizens Participation Act) Motion to Dismiss, also known as the Anti-SLAPP Motion to Dismiss, which has been referenced as "an across-the-board game-changer in Texas civil litigation." *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.). The idea behind the TCPA was to provide companies and individuals who are being sued for their "participation" in protected First Amendment activities a relatively fast and less expensive way to try to end litigation. A TCPA Motion can stop a case in its tracks; with limited exceptions, discovery will be stayed, and after the court's ruling either party has a right to an accelerated appeal.

If the Anti-SLAPP movant prevails, even partially, the Court shall award "court costs, reasonable attorney's fees, and other expenses . . . as justice and equity may require." *Sullivan v. Abraham*, 488 S.W.3d 294, 297–99 (Tex. 2016) (fees and court costs award mandatory). The court "shall" further award sanctions—damages "sufficient to deter the party who brought the legal action from bringing similar actions." TEX. CIV. PRAC. & REM. CODE §§ 27.009(a)(2). In contrast, if the court denies the TCPA Motion and makes an "additional finding" that the TCPA Motion was "frivolous or solely intended to delay," the court "may" award court costs and attorney's fees to the non-movant. TEX. CIV. PRAC. & REM. CODE §§ 27.009(b). The non-movant's fees are permissive and sanctions are not available.

A hearing on the motion must be set within 60 days after the date of service, "unless the docket conditions of the court require a later hearing." *Id.* § 27.004(a). There is no provision in the TCPA to delay the hearing for good cause or on leave of court. The court only has thirty days after the hearing in which to rule, after which the motion is denied by operation of law and is appealable. *See id.* §§ 27.005(a), 27.008(a). The statute provides that "in no event shall the hearing occur more than 90 days after the service of the motion" absent court-ordered discovery. *See id.* § 27.004(a)–(b).

> "Clear and specific evidence" of each essential element of a claim is more than "mere notice pleading" and evidence must be provided with some degree of detail.

In *Lipsky*, the court discussed the TCPA's evidentiary standards. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding). The initial burden of a prima-facie case is met through demonstrating by a preponderance of the evidence that the non-movant's legal action is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *Id.* at 590. The TCPA defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." TEX. CIV. PRAC. & REM. CODE § 27.001(6). Recent Texas Supreme Court law also provides that the content of the communication is the primary subject of focus rather than the actual form of communication. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017). A "legal action" can be considered broadly, which may even include a pre-suit deposition. See *In re Elliott*, 504 S.W.3d 455 (Tex. App.—Austin 2016, no pet.).

If the prima-facie case is met, the burden shifts to the non-movant to establish by "clear and specific evidence a prima facie case" for each essential element of its claim. "Clear and specific evidence" of each essential element of a claim is more than "mere notice pleading" and evidence must be provided with some degree of detail. *Lipsky*, 460 S.W.3d at 590–91 (requiring "enough detail to show the factual basis for [the plaintiff's] claim"). The standard is met when the plaintiff, for each essential element of her claim, provides the "minimum quantum" of "unambiguous," "explicit" evidence "necessary to support a rational inference that the allegation of fact is true." *Id.* at 590. At the hearing, the court considers the pleadings and affidavits. There is no specific provision in the statute that allows or disallows live testimony.

V. Motions for Summary Judgment

The most effective strategy to dispose of claims and/or elements in a motion for summary judgment is to work from a narrowly focused perspective. It is helpful to the Court if you prepare one order granting all relief requested and, in the alternative, prepare a granulated order which includes rulings on each individual claim or element. Unaddressed issues or claims cannot be a basis for summary judgment. *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). If the movant presents some grounds in its motion but omits others, the non-movant is not required to alert the movant, or the court, of the additional grounds that were left out of the summary-judgment motion. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 338 (Tex. 1993).

If a motion for summary judgment is not clearly identified, the substance of the motion determines whether the motion is a no-evidence, traditional, or combined motion. *Binur v. Jacobo*, 135 S.W.3d 646, 650-51 (Tex. 2004). When a party files both a no-evidence and a traditional motion for summary judgment, the appellate court will first consider the no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

In Texas state court, the standard for admissibility of evidence in a summary-judgment proceeding is the same as the evidence required at trial. *E.g.*, *Rockwall Commons Assocs., Ltd. v. MRC Mortg. Grantor Tr. I,* 331 S.W.3d 500, 505 (Tex. App.—El Paso 2010, no pet.). All objections must be in writing, but a separate, signed order is no longer required to preserve an issue for appellate review. TEX. R. APP. P. 33.1(c). However, rulings on the objections must be made and the rulings need

to appear in the record, so a careful litigant will also request rulings and submit proposed rulings on the summary judgment evidence in the order granting a summary judgment or a separate order on the objections. *Id.* R. 33.1.

The trial court may inform the parties that it is granting a summary judgment through a letter ruling, but a letter ruling is not generally considered part of the judgment and cannot supplement a judgment or order to make it more specific. It should also be clear if the summary-judgment order disposes of all claims and all parties and is intended to be final and appealable.

VI. Conclusion

Litigators must navigate between the goals of their clients, who seek efficient resolution of their cases at a reasonable price, with those of the Court, which strives to ensure correct rulings that are consistent with due process. The road to trial is fraught with landmines and dips in the road for litigators, but the effective use of dispositive motions allows savvy litigants to rapidly dispose of meritless claims and allows the court to efficiently resolve disputes.

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CUSTOMIZED LITIGATION STRATEGIES: A REVIEW OF CONTROVERSIAL JURY TRIAL INNOVATIONS

BY RICHARD L. JOLLY

THERE IS A CRISIS IN THE JUDICIARY. Trial by civil jury—a constitutionally anticipated and once primary mode of public dispute resolution—is disappearing. Indeed, while federal juries decided 5.5% of civil cases in 1962, by 2015 that number had fallen to a paltry 0.76%.[1] A similar trend is apparent in state courts around the country.[2]

This is a problem. Without jury trials, the American system of civil justice, and more importantly self-government, degenerates. As William Blackstone recognized over two centuries ago, "Every new tribunal erected for the decision of facts, without the intervention of a jury, . . . is a step towards establishing aristocracy, the most oppressive of absolute government."[3] Restoring the civil jury will require affirmative action and creative thinking.

Stephen D. Susman founded the Civil Jury Project at New York University School of Law in 2015 to spark such thinking. As the nation's only non-profit, academic institute dedicated to studying the issue, it has been at the forefront of reviewing efforts to rejuvenate the civil jury. The Project has held dozens of informational events around the country, and currently has a network of over 230 state and federal judicial advisors, over 60 professor advisors, and nearly 50 jury consultant advisors. It has further operated as a clearinghouse of information, sharing innovative proposals between legal actors to help encourage the use of customized litigation strategies.

> Permissive statutes mean that forward-thinking attorneys are free to construct agreements and propose their use to judges.

The Civil Jury Project has focused on nine innovations in particular. They include: (1) Limiting the Length of Trials; (2) Preliminary Substantive Instructions; (3) Juror-Posed Questions; (4) Pre-Voir Dire Questionnaires; (5) Opening Statements Before Voir Dire; (6) Interim Arguments by Counsel; (7) Back-to-Back Expert Testimony; and (8) Juror Discussion of Evidence Before Deliberation. The proposals have existed since at least the 1980s, and have been used to varying degrees around the country since. Each of them addresses the main criticisms leveled at jury trials—that they are too long, too expensive, and too unpredictable—and are designed to make trial by civil jury a more desirable form of dispute resolution.

Furthermore, most jurisdictions do not prohibit the use of these innovations. Permissive statutes mean that forward-thinking attorneys are free to construct agreements and propose their use to judges. By crafting such procedural agreements, the parties are able to empower the jury to more quickly and accurately resolve their dispute. Likewise, judges are free to impose these innovations—even without the attorneys' consent. Through experimentation, judges can identify those practices that make the most efficient and effective use of the jury system.

The theoretical and legal support for each of these innovations has been explored elsewhere.[4] And indeed, there is much support for them from both the bench and in the academy.[5] Recently, however, the Civil Jury Project and the American Society of Trial Consultants completed a survey of nearly one thousand attorneys on their perspectives of the innovations. Respondents answered questions on their personal use of each trial innovation, and noted whether they would recommend others implement them. If they did not recommend their use, the attorneys offered brief rationales for their aversion.

A full report on the public survey is available on the Civil Jury Project's website.[6] Offered here is a review of the three least commonly practiced and most controversial proposals, and provides a discussion on the certain benefits and supposed detriments of each.

1. Imposing Strict Trial Time Limits Early

It should seem obvious, but one of the easiest ways to ensure that trials move more quickly is to set trial time limits at the outset of the trial. This proposal is recommended by the American Bar Association, which has stated that "[c]

ourts should limit the length of jury trials insofar as justice allows," and that "jurors should be fully informed of the trial schedule established."[7] Every court to address the issue has confirmed that judges can unilaterally set reasonable time limits. And, of course, parties remain free to draft their own agreements, which should be encouraged since they are likely most familiar with the existing evidence.

But surprisingly, this is one of most polarizing practices among attorneys. According to the survey, only 47.4% of attorneys had experience with this practice, with only about half of those recommending the practice. On the contrary, 31.2% of those with experience did not recommend the practice. The most common reason given by those attorneys opposed is that artificial time constraints hamstring good lawyers without regard for the realities of the case.

This fear is exactly backwards. Though it is true that time limits may force attorneys to abandon weaker alternative arguments, this trimming of the fat often results in a stronger overall presentation. Confident attorneys should therefore welcome this practice. Moreover, trial time limits have a "trickle down" effect. For instance, attorneys will have no reason to waste money on needless and duplicative discovery when they know that the majority of it will never see the light of day. Trial time limits, then, offer one of the easiest ways that judges and practitioners can start to reform America's jury trials.

2. Delivering Opening Statements to the Entire Venire

The next innovation is one of the least common. It suggests allowing attorneys to deliver full- opening statements to the entire venire before voir dire. This is beneficial because it makes for a more substantive and comprehensive voir dire. If potential jurors understand what the attorneys are driving at, they are more capable of searching their individual experiences and biases to provide better, more complete answers. Counsel for both sides can then more cogently exercise peremptory and for-cause challenges, thus resulting in a more satisfactory decision-making body.

Many states already have laws that provide for attorneys to provide mini-openings before voir dire, which serve a similar function to our proposal. Yet only about 25% of public survey respondents had experience with these. Of those with experience, 66.5% of attorneys recommended mini-opening statements, while just 12.6% did not. Those opposed to the practice believed that openings predisposed the jury to certain positions. And some noted that mini-openings wasted time because full opening statements were nevertheless still required.

The Civil Jury Project recently teamed up with Judge Thomas Marten of the U.S. District Court for the District of Kansas to survey attorneys' and jurors' opinions after experimenting with full opening statement before voir dire. The jurors remarked that they did not think that the attorneys were primarily arguing their case during openings, and felt that the information that was given to them helped them answer voir dire questions more thoroughly. The attorneys agreed, believing that earlier opening statements allowed voir dire to be more complete and effective. Some of the attorneys worried that it allowed jurors to self-select in or out, but one attorney noted that opportunities for self-selection were likely similar to the traditional context. The only negative feedback was that one attorney noted that she felt punished for having convinced jurors in opening statement and having them struck for cause. Generally, all of the attorneys seemed open to expanding the practice, with one openly recommending that courts do so.

There are many limitations with this small study. But it does suggest that attorneys and judges should not be overly apprehensive about experimenting with the timing of opening statements. Attorneys should feel free to negotiate on this point, and discuss their preferences with the judge. And if there is no statute to the contrary, judges should feel free to unilaterally impose this practice.

3. Allowing Jurors to Discuss Evidence Before Final Deliberations

This final innovation to be discussed is also the most controversial and least practiced. To be sure, allowing jurors to discuss the evidence prior to final deliberation is blasphemy to many practitioners. Yet in a number of jurisdictions, including Arizona, Colorado, and North Dakota, jurors are permitted to discuss evidence prior to final deliberations, so long as all jurors are present in the room and they do not reach a final decision until all the evidence has been presented.

The public survey showed that only 8.6% of respondents had experience with this innovation, making it the least common of the nine recommended proposals. Of those with experience, 67.2% recommended allowing jurors to discuss evidence, and 10.4% opposed it. Those opposed to the practice gave the typical responses: They worried that discussing evidence early led to camps forming among the jurors, which caused them to inadequately consider certain evidence.

The problem with this criticism is that no empirical evidence

supports it. In fact, Arizona carefully studied this innovation before deciding to implement it. They found that 89% of juries that were instructed that they could discuss evidence in the case before deliberation chose to do so.[8] And later studies have found that jurors who have been allowed to engage in interim discussions, do not to make any final decisions until final deliberations.[9] Furthermore, there appears to be no difference between those jurors allowed to discuss evidence and those prohibited from doing so as to when they started to solidify their decisions.[10]

So just like time limits and full opening statements before voir dire, attorneys and judges should not be scared of allowing jurors to discuss evidence early. Indeed, those who wish to gain the benefits of jurors who are more engaged throughout the trial, and therefore presumably more likely to return accurate decisions, should consider proposing this option. With everyone's consent, this innovation can be implemented even without statutory authority.

Conclusion

There are a few takeaway points that must be stressed. There is no question that America's civil jury system is in crisis. And it will largely fall on the bench and bar to fix it. The Civil Jury Project has promoted nine innovations as ways to make jury trials faster, cheaper, and more accurate. The attorney survey shows that with each one of these innovations—even the three most controversial outlined here—attorneys who had experience with them were more likely than not to recommend their use. Frankly, that's incredible, especially coming from a profession that is often criticized as being reluctant to change. Attorneys should therefore feel emboldened to recommend these customized litigation strategies, and negotiate their use. And if the attorneys are too entrenched in the heat of battle to do so, judges can impose many these innovations unilaterally. By taking proactive steps, the bench and bar can make litigation better for themselves as well as help resuscitate this most cherished of American institutions.

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1 *Compare* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. Emp. Leg. Stud. 459, 554 tbl.A-17 (2004) *with* Administrative Office of the United States Courts, Table C-4, U.S. District Courts – Civil Cases Terminated, by Nature and Suit and Action Taken (Sept. 30, 2015), http://www.uscourts.gov/statistics/table/c-4/judicial-business/2015/09/30.

2 *See* Galanter, *supra* note 1, at 510; Carol J. DeFrances et al. Bureau of Justice Statistics Special Report, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, 222.bjs.gov/content/pub/pdf/cjcavilc.pdf.

3 3 William Blackstone, Commentaries at *380.

4 *See, e.g.*, Stephen D. Susman, *Innovations to Improve Jury Trials in Texas*, *in* TEX. BUS. LITIG. 2017.

5 The Civil Jury Project produces a monthly newsletter, which often contains judicial and academic opinions on these and other trial innovations. All of these newsletters are available on the Project's website. *See* http://www.civiljuryproject.law.nyu.edu.

6 *See* http://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Attorney-Survey-Report-2016.pdf.

7 Am. Bar Ass'n, Principles for Juries & Jury Trials § IV (Aug. 2005).

8 *See* Shari Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

9 Thomas G. Munsterman, et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUMAN BEHAV. 359, 370 (2000).

10 *Id.*